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LAW AND ECONOMICS

1. It is difficult to understand why, although the lawyer finds a certain knowledge of economics indispensable and the practical economist finds a certain knowledge of the law equally valuable, the relationship between law and economics has never been given the consideration it deserves. The economist is usually interested in the law only when he is tracing the effects of some particular legislation upon the economy¹ or when, in explaining economic history, he comes across some great legal changes which have had severe repercussions upon economic events; as, for instance, the laws relating to limited liability companies during the nineteenth century. It is remarkable that the attention of economists has not been drawn more to this subject when we remember that an important section of economic theory, namely the economics of taxation, is concerned among other things with the specific problems which arise out of the levying of taxes—problems concerning the effects of legislation upon the economy. The following paper arises from some reflections of an economist upon the great importance of the whole legal framework for the functioning of the economic system.

2. The science of economics is concerned with the problem of distributing the limited energies and natural resources at the

¹ See Colin A. Cooke, "Legal Rule and Economic Function. Competition and Restraint of Trade," *Economic Journal*, 1936, in which the implications of laws relating to contracts in restraint of trade are analysed. Also E. J. Riches, "Conflicts of Principle in Wage Regulation in New Zealand," *Economica*, 1938, in which the economic problems consequent upon wage regulation are considered.

disposal of man to satisfy his unlimited wants as far as possible. All the wants of all persons can never be satisfied but we shall consider that the economic optimum has been attained when it is impossible to transfer any of the natural resources and human energies from the satisfaction of one want (say food) to the satisfaction of some other want (say shelter) without decreasing the total satisfaction obtained from the use of the given amount of energy and natural resources. In order to solve this problem rigorously and realistically we should need to know the natural resources of the economy, the size and characteristics of the population, the private property of each individual, the wants of each person and their order of preference, the state of technical knowledge and the institutional framework within which the economic activities of the population are to be executed. If we had sufficiently detailed information about all these items we should be in a position to say exactly what economic events would take place. In the terminology of economics if we are given all the data we can fully determine the economic equilibrium of the system. If we also had detailed information of all future changes in these items we should be able to determine the "dynamic equilibrium" of the system and predict accurately all economic events in the future as well as in the present. It is to be stressed, however, that each one of these items, the given data which fully determine the quantities of goods and services produced and their distribution among individuals, is important in determining the final result and the existence of different sets of circumstances with respect to them would lead to different end-products.

3. Though many studies have been made of the effects on an economy of changing population, of changing technical knowledge (e.g. inventions), of changing tastes and so on it is very seldom that any analysis is made of the effects of changes in the institutional framework. The vast body of economic theory which has been built on the general principles outlined above has never concerned itself with such problems as "how would changes in the institutional framework affect equilibrium?" or "what particular institutional framework is required in order to achieve some desired position of equilibrium?" It is a surprising fact that Marxism with its stress on the importance of the social structure of a community for the determination of production and distribution of goods has not stimulated economists to investigate these problems more thoroughly. Yet the importance of the institutional framework cannot be said to be less than that of any other of the items enumerated above. Within this item we have all the ethical norms of the community, all social customs

and all laws concerning the relation of persons one to another and to the State. In fact, using rather a broad definition of the word, it comprises law. Law in this sense prescribes limits to the range of possible actions of individuals and thereby sets bounds to the ultimate equilibrium of the whole economy. It is therefore a very important weapon of economic control. While it is difficult to control changes in population, changes in tastes, changes in technical knowledge and so on it is very easy to make laws once they are considered desirable and so obtain some desired economic situation; the question of the relationship between law and economics therefore assumes great importance. ~

4. Law has another very important bearing on economics through its influence on uncertainty. Modern economics has come more and more to the view that the "expectations" of individuals are the determinants of economic actions and are therefore predominant factors in the determination of economic equilibrium and the stability of equilibrium once it is reached. The entrepreneur, the lender of capital, the landowner, the worker and the consumer all act according to that plan which they think will yield the maximum return. In the complexity of the modern world most of the actual returns depend upon how accurately future events have been anticipated. The future is uncertain and each person has to estimate what is going to happen in the future in order that he may determine his actions to-day—and the estimates he uses are termed his "expectations." Expectations can be placed into two separate categories, (a) expectations of natural events and technical developments (e.g. forecasts of harvests and estimates of improvements in television) which are largely beyond human control, and (b) expectations of the actions of other persons. Category (b) is obviously the most difficult to determine since we have not yet as much skill in predicting the actions of human beings as in predicting natural events and general scientific development. It is also the most important category because the majority of men are dependent for the success of their undertakings upon the actions of many other individuals, perhaps distributed in all parts of the world. In order to diminish the number of expectations required in the conduct of business man has invented contracts. If two individuals bind themselves to fulfil some definite obligations to each other at some definite future date then certainty has taken the place of uncertainty in respect of these obligations. In order that every contract should be perfectly definite the law of contract has developed. Methods of enforcing agreements made between two parties have been specified in order that individuals may rely on the fulfilment of

their contracts. It is clear therefore that the law regarding commercial contracts plays a very important part in determining the degree of certainty which can be attained in business dealings and is therefore of the greatest importance for the efficiency and stability of the economy. It should be pointed out, however, that although the degree of certainty for individuals depends upon the laws of contract the degree of certainty which can be attained by the community as a whole is not affected but is entirely determined by the extent of technical knowledge. The law of contract merely affects the smoothness with which equilibrium can be achieved.

5. The economic system must be adapted to changing conditions and must incorporate new ideas if it is to attain the highest possible efficiency. It follows that its institutions must play an important part in this adaptation and that new laws must be made or old laws must be modified in the light of new developments. Old laws may hamper the introduction of ideas and methods of production which would result in definite improvements in economic efficiency. An example is available in the recent development of instalment selling—an institution which, through its effects on house building, has been mainly responsible for the recent recovery in this country. The introduction of instalment selling has revolutionised the sale of expensive durable goods. The consumer has been enabled to enjoy the fruits of his savings during the long period required for him to accumulate them. The production of such durable goods has been stimulated far beyond the level which would have been attained had the consumer had to save his capital before purchase could be made. Houses, motor-cars, pianos and wireless sets have been produced on a much greater scale largely because of the new idea of instalment selling. In addition saving, a necessary concomitant of increased production, has been stimulated by the possibility of hire-purchase. The introduction of instalment selling meant, however, that a body of law was required to establish it on a workable basis. The body of law in existence before the introduction of instalment selling has proved sufficient for the new idea to work but it was only recently that the problem of adapting the law to the requirements of instalment selling was tackled in a scientific manner. If the full benefits of technical and economic progress are to be reaped a quickly adaptable legal system is a necessity. ✓

6. The institutional framework becomes even more important when changes in the very foundations of the economic system are taking place. It is only by means of law that such changes can be made. One of the major problems before economists to-day is

the problem of whether such changes are necessary. Some economists argue that it is possible, by scientific planning, to obtain the optimum distribution of energies and natural resources and the optimum distribution of products among individuals. They argue that a planned economy would not only be quite as efficient as the *laissez-faire* economy in Britain to-day but that unemployment would be eliminated. On the other hand the opponents of this view hold that, though theoretically the equilibrium which is automatically reached in a *laissez-faire* economy may also be worked out by planning, the practical difficulties in the way of planning mean that a planned economy is certain to be less efficient than a *laissez-faire* economy in satisfying consumers' demands. The latter group do not imply that the *laissez-faire* economy of this country at the present time with its monopolies, its cartels, its trade unions and other rigidities is perfectly efficient: they merely make the point that it is not yet possible in the present state of knowledge to obtain even the efficiency of this inefficient system by planning. There is, however, a serious inadequacy in this argument and its defects are becoming even more apparent in the present international situation. Ethical and strategical considerations have been neglected. It may well be that what loss in efficiency may occur when planning is adopted is more than counterbalanced by the fact that unemployment can be eliminated.² and that a planned economy would be much more able to organise on a war basis. The necessity for re-armament in this country and the need for industrial mobilisation has brought this question to a head and we have now to decide whether it is possible to stop at the partial planning which would be required to carry through industrial mobilisation or whether it will be necessary to extend planning to all branches of economic life.

Once it is decided that any particular economic system is to be preferred it is obviously desirable that the set of institutions in existence should be compatible with and favourable to that particular type of economy. In other words there is one optimum set of social and legal institutions to every type of economic system, be it feudalism, competitive capitalism, communism or fascism. The importance of the relationship between law and economics is made obvious when we turn to this vexed question of planning v. *laissez-faire*. For, assuming that a planned economy is considered to be desirable and that the present economy is to be transformed into a planned economy it is obvious that such

² Since every person can be ordered to do something even if it is a superfluous task; or hours of work can be adjusted so that every individual is employed.

✓ transformation can only be carried out by means of new laws and new institutions. Planning implies dictation where necessary and this implies restrictions upon the field of actions of the individual. This in turn implies definite laws relating to what the individual may do, may not do and must do. If planning is to be the next development of man's organisation for production the importance of law in economic life will be enormously increased and the formation of laws will need a much deeper knowledge of economics.

The significance of the relationship between law and economics has not been clearly recognised in the case of a *laisser-faire* economy. The precise nature of the legal and institutional framework most suitable to such an economy has never been worked out. Perhaps it is because the idea of a *laisser-faire* economy is closely linked with the idea of the absence of any restrictions in the economic field. Yet it is obvious that once "perfect competition" has been found desirable and clearly defined the law should ensure the actual attainment of "perfect competition" in all markets. Any attempts by individuals or groups of individuals to introduce monopoly should be frustrated and any possible legislation to ensure the rapid adjustment of the markets to variations in economic data should be made. The law should be so framed that it would allow the smoothest possible working of such a competitive system.

✓ Similarly if it is thought desirable that the economic system should be partially planned there is still the problem of designing that legal system which will best guide the economy along this road. It is clear, therefore, that whatever the outcome of the controversy concerning planning the legal system will have to be designed in the closest possible alignment with economic theory and this "economic law" as it might be called will occupy a central position in the institutional framework whether we "plan" for *laisser-faire* or for a planned economy.

7. One might be tempted to suppose, from this argument, that law should be consciously designed to serve economic ends alone. That once a type of economic system is chosen an optimum framework of law should be erected to render the attainment of the economic equilibrium as speedy and frictionless as possible without regard to any other criteria. But this ignores ethical and strategical factors. It may be that some efficiency would readily be sacrificed for equity or in order to obtain certain advantages for the whole community which would otherwise be unattainable. Thus it may be thought desirable to have Agricultural Marketing Boards which, though they mean decreased economic efficiency, mean a certain measure of self-sufficiency in time of war. It may also be

thought desirable to preserve the railways in face of competition from the road merely because of the strategic advantages. The final conclusion to be reached is, then, that the system of law should be drawn up so that in general the economic ends of the community are realised with the minimum possible expenditure of energies and resources, but that deviations from this principle are in order as long as the economic costs of the deviations are equated to the value of the advantages to be gained strategically or ethically.

8. The adoption of this point of view concerning the relationship between law and economics means a critical examination of present methods of law-making. There can be no doubt that the existing procedure does ensure that economic considerations do play an important role in the drawing up of laws and in their enactment. This is not the place to examine this procedure in detail. But there is no doubt also that many economic implications of legislation are not discovered by any *a priori* reasoning but are discovered empirically—and painfully—after their enactment. A few examples of economic effects of legislation may illustrate this point. In all cases it is difficult to imagine that these effects were in the minds of those who made and those who passed these laws.

The Milk Marketing Scheme is an instance of the suppression of free competition for socio-ethical and strategical reasons. But it would be thought that, even though the quantity of milk produced and the prices at which it is to be bought and sold are fixed in the interest of the farmer, the actual distribution of the milk should be left to free competition in order that the distribution may be handled by the most efficient firms. Under the existing legislation the distributor must sell milk at the prevailing price in the district (fixed by the Board) yet the Co-operative Society is permitted to give a dividend on milk sales. It is true that other distributors are permitted to allow the same dividend as the Co-operative Society if they wish but they must not allow more. In other words one distributor is unrestricted in the reduction of price he may make while his competitors may only reduce prices as far as he does. There is an additional effect of this regulation. Since the Co-operative dividend is announced only quarterly it follows that another distributor must promise an unpredictable reduction in price for a period of three months if he wishes to compete on equal terms with the Co-operative Society. These are conditions of uncertainty which are certain to create very grave problems for other distributors and which seriously penalise them when competing with the Co-operative Society. This is a case

where one small section of a law has caused considerable inequality between competing firms in an industry and may have appreciable effects upon economic efficiency.

Another interesting repercussion of the law occurs in connection with rates and unoccupied houses. At present the law frees the owner of an unoccupied house from the necessity to pay rates. This has had the effect that a house which cannot be let at a rent sufficient to pay rates and cover maintenance expenditure and ground rent remains unoccupied. From the economic and the social point of view this is undesirable. The house is in existence and as long as it is not more profitable to demolish the house and build some other structure it should be let to any family unit willing to pay maintenance expenditure.

Finally an instance was given before Section F of the British Association this year when a paper was read on the problem of road *v.* rail transport.³ A convincing account was given of the unfortunate effects of recent legislation concerning competition between road hauliers and the railways. It was pointed out that very often the most economical form of transport was road transport but that the actual effects of the legislation had been to prevent the full development of road transport in favour of rail transport. Such an uneconomic view was taken by the Tribunal that lower charges could not be adduced as proof of the greater suitability of road transport when applying for licences and an application for permission to run additional vehicles had to include proof of actual orders necessitating additional vehicles for their execution. This is a case where the economic consequences of the law may prove very serious for industry as a whole since transport costs are extremely important in determining the qualitative development of industry and its location. It is obviously necessary that the precise implications of such legislation should be made clear before judgment is made whether the economic cost of the preservation of the railway system is over-balanced by the strategic advantages which will accrue.

9. Economic problems such as these are certain to arise whenever regulations (direct or indirect) are imposed upon economic activity. And, unless unforeseeable and perhaps undesirable repercussions are to follow, it is clear that a very careful scrutiny of any proposed legislation of this nature must be made by lawyers who are at the same time expert economists. The economic cost of any ethical or strategical advantages of proposed legislation must be very carefully estimated before the law can

³ *The Economics of Road Haulage since the Rail and Road Traffic Act of 1933*, by Gilbert Walker.

even be considered and the lawyer must then perform the function of blending the requirements of the economic system with the social and ethical requirements of the day. To do this he must have a clear knowledge of the effects of this or that restriction upon the economy. His economics must be impeccable. Either we are to require some such lawyer-economist to prepare the law or there must be some machinery whereby the lawyer on the one hand and the economist on the other can collaborate in the elaboration of law. It is only then that the economic ends and the ethical ends of society will be reconciled.

H. W. ROBINSON.

“FAMILY” LIFE INSURANCE POLICIES UNDER THE MARRIED WOMEN’S PROPERTY ACT, 1882

THE recent case of *Re Sinclair’s Life Policy*, [1938] 3 All E.R. 124, once again illustrates the need of some revision of the law relating to what are sometimes known as “family” or “matrimonial” life policies. A change was foreshadowed, it will be recalled, in the last report of the Law Revision Committee,¹ and it may be useful at this time to examine the historical development of these policies and to inquire whether the Committee’s recommendations are necessary and sufficient.

The present law on the point is contained in s. 11 of the Married Women’s Property Act, 1882, which was aimed at creating, or at least confirming, a simple method whereby one spouse might make some provision for the other spouse and children on his or her death. In most cases the wife and children are financially dependent, at least partially, on the husband, but it must not be forgotten that the death of a wife who renders ordinary household services to her husband and family, may cause the husband considerable expense in the future, and to that extent he is also dependent on her.

The simplest way of effecting this object is by insuring the life of the spouse upon whom the others are dependent, but an ordinary policy of life insurance would not be sufficient, for on the insured’s death these dependants might find the whole of the insurance moneys swallowed up in payment of debts. Consequently a practice grew up of inserting a rather elaborate declaration of trust in the policy, in which the insured solemnly stated that he constituted himself and his executors or administrators trustees of all moneys to be paid under the policy, for certain named persons, being those whom he wished to protect. The result of this, of course, was the same as if he had executed a declaration of trust for a similar sum then belonging to him, and, provided it was not a fraud on creditors, the beneficiaries were protected to that extent.

Of course, the ability to benefit under a declaration of trust of insurance moneys was not limited to husbands, wives, and children of the insured; a man might quite as well effect such a policy for the benefit of a favourite nephew, his mistress, or an old servant, etc., but as it is generally recognised that a man’s first duty is to his wife and children, there was a strong feeling that such policies should be encouraged.

¹ Sixth Interim Report; Cmd. 5449.

The need for this type of policy has never been so urgent amongst the upper classes, whose children and wives enjoy the protection of marriage settlements, and who do not suffer so much financially on the loss of a breadwinner as those whose incomes are less ample. But on the other hand the poor man is less able to take all the necessary steps to see that this declaration of trust was well-drawn and watertight. Consequently it soon became plain that if this practice was to have its fullest use the form of the policy must be simplified, so that the poor as well as the rich might be enabled to provide for their dependants, each to the best of his ability. How far the present enactment attains that end is a question that must be deferred till later, and in the meantime it is proposed to recount, very briefly, the development of this practice.

The first legislation on this point appeared in 1870, and in a case which came before the Courts soon afterwards, *Mellish, L.J.*, referred to the position at common law.² He said:

“Supposing that before the Act a married man had effected a policy on his own life, it might be doubted whether, before the Act, a simple declaration on the face of the policy that it was for the benefit of his wife and for his children, would have been sufficient to make a trust for the wife and children. But anybody could, without any difficulty, have, either by the same instrument or by another instrument, expressed and declared a trust for the benefit of the separate use of the wife, and after the death of the wife for the use of the children.”

The relevant section in the Married Women's Property Act of 1870, then, was aimed at simplifying this practice, and ran as follows:

“A policy of insurance effected by any married man on his own life, and expressed, upon the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate.”³

This was obviously a very valuable protection, and it was gained simply by confirming the decision in *Tomlinson v. Gill*

² *Holt v. Everall* (1876), L.R. 2 Ch.D. 266, at p. 275.

³ 33 & 34 Vict. c. 93, s. 10.

(1756), Amb. 330 (27 E.R. 221)⁴ so far as the policies affected by the Act were concerned. The beneficiary was to be permitted to enjoy a vested right in a contract made by two other people: in the contract, it should be noted, and not in the policy moneys, "a policy of insurance . . . shall . . . be deemed a trust."

It will be observed that this section refers only to insurances effected by a husband on his own life. Griffith's *Married Women's Property Act* says:⁵

"Before that Act, policies were rarely effected (by married women) owing to the incapacity of the wife to contract, except as the agent of her husband, and subject to his right to adopt her contracts for his own advantage."

But as the emancipation of women progressed, and their contractual capacity increased, this provision ceased to be adequate, as was shown in *Re Burgess' Policy* (1916), 85 L.J.Ch. 273 (*sub. nom. Lee v. Scottish Union, etc.* (1915), 113 L.T. 443) which,⁶ in spite of its late date concerned a policy effected under this Act. There a married woman, in a policy insuring her life, stated that she desired it to be in terms of this Act, for the benefit of her children, but it was held that this was not sufficient to create a trust for the children, giving them a vested right of property in the policy moneys, and that a bequest of the moneys to some only of the children was good.

Consequently this enactment, though it still continued to govern policies taken out while it was in force, was succeeded in 1882 by s. 11 of the Married Women's Property Act, 1882,⁷ the terms of which, so far as they are relevant are:

"A policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

⁴ This was the first case in which it was recognised that a third party might acquire an enforceable right under a contract made for his benefit by two others. See A. L. Corbin, "Contracts for the Benefit of Third Parties" (1920), 46 L.Q.R., page 12.

⁵ 5th ed. (1883), at p. 82.

⁶ Following *Cleaver v. Mutual Reserve Association*, [1892], 1 Q.B. 147, as to which see *post*.

⁷ 45 & 46 Vict., c. 75.

The main effect of this rather cumbrous language would seem to be to extend the privileges enjoyed by a husband under the former Act to a wife. A further difference was pointed out in *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126, to be the addition of the word "unperformed," referring to the objects of the trust. The phrase "any object of the trust remains" in the former Act had been held to refer to persons⁸ but the insertion of this extra word made it clear that the phrase was intended to refer not to the beneficiaries, but to the purposes of the trust. In that case it was held that a policy taken out in pursuance of the section and expressed to be for the benefit of a named wife gave her a vested interest, which passed to her personal representatives and not to her husband, on her predeceasing him. It is submitted that the mere fact that the wife is named cannot, under ordinary circumstances, make any difference, for if a gift to a person is to take effect in possession, the donee must be certain, and a policy taken out by a husband and merely said to be for the benefit of "my wife," must give her a vested interest just as certainly as if she were named.⁹

At first sight this submission is hard to reconcile with *Re Browne's Policy*, [1903] 1 Ch. 188. In that case it was held as a fact¹⁰ that the reference to "my wife" in that policy was intended by the insured to mean such wife of his that might be living at his death. The deciding factor, in all cases, must be the intention of the insured, as extracted from the wording of the policy. The description "my widow" obviously means "my wife living at my death," but plain references to "my wife" must in most cases, it is thought, mean the insured's wife at the date of the proposal. It is, of course, a pure question of fact in each case.

If this, then, be the true construction of the Act of 1882 (and on this point the better opinion, so far as a husband's policy is concerned, is that it does not differ from the 1870 Act: see *per* Lawrence, L.J., in *Cousins v. Sun Life, etc.* (*supra*) at p. 173), it would appear that a case such as *Re Burgess' Policy* (*supra*) would have been decided the other way had it been a husband's policy, or had it arisen on the same facts under the later Act. Some of the language of Swinfen Eady, J., in *Re Parker's Policy*, [1906] 1 Ch.D. 526 (in which he purported to follow *Re Browne's*

⁸ *Robb v. Watson* [1910] 1 I.R. 243; followed in *Re Collier*, [1930] 2 Ch. 37: (both disapproved in *Cousins' Case*). *Contra*, *Prescott v. Prescott*, [1906] 1 I.R. 155.

⁹ This is so in U.S.A. The Restatement of the Law of Contracts, in such a case, considers the beneficiary to have a vested interest. See Arts. 142 and 143.

¹⁰ Or at least it was assumed by the Court of Appeal, in *Cousins v. Sun Life, etc.*, to have been decided in fact. Otherwise, it is submitted, they would have overruled the case. See *per* Lord Hanworth, M.R., at p. 135, and Lawrence, L.J., at 138.

Policy (supra), seems unnecessarily wide, but the actual decision, that a second wife was entitled to policy moneys under a policy made by a husband pursuant to the 1870 Act for the benefit of the insured's widow and children, reserving to himself a power of appointment which he had exercised in favour of the second wife, is quite consonant with the suggestions advanced above.

Further support for the theory that an ordinary policy under these Acts confers a vested interest upon the beneficiaries is given by *Re Griffiths' Policy*, [1903] 1 Ch.D. 739, where the policy, taken out in 1877, was said to be "for the benefit of (the insured's) wife or if she be dead between (*sic*) his children in equal proportions," and after his first wife's death the insured married again and was survived by the second wife, four children of the first marriage, and one of the second. It was held that all the children were entitled, to the exclusion of the second wife.

The result of all these cases may be summed up as follows: Apart from Statute, a policy which was on the face of it, merely stated to be "for the benefit" of anyone other than the insured, conferred on that other no actionable right at all; under the 1870 Act such words, when used by a husband of his wife and/or children, whether by name or not, in a policy on his own life, gave such beneficiary an immediate vested right which could not be divested unless the husband had expressly reserved such a power (in other words, the beneficiary's rights accrued as soon as the policy was effected); and under the 1882 Act, which is still in force, the same power was extended to a wife insuring her life.

It is noteworthy that in this field, as in so many others, the Legislature has pointed to a forward path, which the Judiciary has been reluctant to follow. Even before this question had attracted the attention of Parliament, it would have been quite possible for the Courts to have extended an actionable right to the beneficiary of a policy, and on good authority, for already, in 1876, when Mellish, L.J., denied the existence of such a right,¹¹ the principle of holding third-party rights in trust was well established in equity,¹² and a clear recital in a policy that it was to be for the benefit of another would surely have justified the application of this theory. Much more so could this have been done in *Re Burgess' Policy* (or *Lee v. Scottish Union, etc.*) (*supra*) where the wife's reference to the Act of 1870, though that was in terms restricted to husbands' policies, was strong evidence that she intended to create a trust in favour of all the children. However,

¹¹ *Holt v. Everall (supra)*.

¹² See *Tomlinson v. Gill (supra)*, *Gregory v. Williams* (1817), 3 Mer. 582 (36 E.R. 224); *Fletcher v. Fletcher* (1844), 4 Hare 67 (67 E.R. 564), and other cases cited by Corbin, *op. cit.*

no attempt was made to persuade the Court to apply the trustee theory, and it can only remain a matter for conjecture whether, if it had been, the decision would have been the same.

Suppose at the present day, a man took out a policy on his life, in which he expressly stated that he did so for the benefit of his nephews X and Y, in the same way as, under the Act of 1882, he might do so for the benefit of his children. It is undeniable that by a properly worded declaration of trust the insured might create such an immediate interest in X and Y, and why should not these words be sufficient to effect the same purpose? The nephews could not call in the aid of the Statute as such, but surely it could be urged to the Court that the relevant section of the Act would have to be read as part of the policy? A question something like this was raised in *Re Engelbach's Estate, Tibbets v. Engelbach*, [1924] 2 Ch. 348, but not satisfactorily settled. There, in a proposal for an *endowment* policy, there appeared against "Name, etc., of Proposer" the words "E.C.E. for his daughter M.N., aged one month," and the policy provided that a certain sum was to be paid to M.N. if she survived a certain date, but if she did not, all premiums were to be repaid to E.C.E. The policy, it will be noted, was taken out by the father on the life of his daughter, and so was not within the Statute at all, and further, it appears from the language used by Romer, J., that he did not treat the case as one of life insurance at all, but one of pure endowment, which he assumed was not covered by the Act.¹³ The daughter survived the named date and was paid by the insurer, but it was held that the father's representatives were entitled to recover the money from her. Romer, J., said that it followed from *Cleaver's Case (post)*, "that the mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated" (at p. 353). But if, by reference to the Act, he had demonstrated that it was his intention to create a trust, would that not entitle the beneficiary to receive the money?¹⁴

¹³ In this he was wrong: *Ioakimidis v. Hartcup*, [1925] 1 Ch. 403.

¹⁴ It is difficult not to agree with the conclusion reached by Professor Corbin regarding this case. "There is even greater difficulty in understanding how the Court could, with a good conscience, take the money away from the daughter after the insurer had exactly performed its contract by paying it to her, and give it to the executors of the will of the insured, who by the express terms of the contract were to get only the return of the premiums, and that sum only on an express condition that was never fulfilled." (*Op. cit.* p. 39.)

In a case mentioned in *Re Engelbach* the same result was reached by a different method. This was in *Re a Policy of the Scottish Equitable Society*, [1902] 1 Ch. 282, where A effected a policy on his own life "for behoof of B," a stranger. B predeceased A, and on the latter's death it was held that as A had paid all the premiums and there was no presumption of advancement between them, B was a constructive trustee for him, and that though B's representatives were entitled

In view of the recent decision in *Re Clay's Policy of Assurance; Clay v. Earnshaw*, [1937] 2 All E.R. 548, it appears that this question must now be definitely answered in the negative. In that case a husband, in pursuance of the 1882 Act, effected a policy on his life, which was stated to be for the benefit of his wife, and if she were dead when the policy moneys became payable, for the benefit of his named daughter, and if she were also dead, for his executors, administrators or assigns. The daughter was an adopted child, but there had been no legal adoption under the Adoption of Children Act, 1926.¹⁵ The insured sought a declaration that the daughter had no beneficial interest in the policy moneys, and Farwell, J., held that the expression "children" in s. 11 of the Married Women's Property Act, 1882, must be strictly construed, and was limited to lawful children of the insured. He was pressed to read a trust for the daughter into the policy independently of the Act, but this he refused to do, being of the opinion that the matter was already decided by *Re Engelbach's Estate*, from the headnote of which he quoted:

"An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, and she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy moneys belong, not to the daughter, but to the estate of the assured, and must be paid to his executors."

But there is one difference between that case and *Clay's Case*, and that is that in the former it was not absolutely certain, though very probable, that the father intended the policy to be for the benefit of the daughter. In that case Romer, J., said:

"In the proposal form Mr. Engelbach, the father, did not say that he was effecting this policy for the benefit of his daughter but said that he was making the proposal for his daughter. . . . I think that the words of the proposal really mean . . . that the father entered into this contract in his own name and on his own behalf, but for the benefit of his daughter." (Pp. 255-6.)

It is doubtful whether these words indicate anything more than to receive payment of the money, they were bound to hand it over to A's representatives. So that instead of the insured being considered a trustee for the beneficiary, as has been the point at issue in all the other cases, here, the beneficiary, or rather the nominee, for there was no evidence that the policy was taken out for the benefit of B, was held to be a trustee for the insured.

¹⁵ 16 & 17 Geo. V. c 29.

the doubt that was obviously in the learned judge's mind, but a not unlikely explanation of them is that he regarded the father as investing the money with the object that it should return to himself, but with a kind of note *for his own use*, to employ the proceeds on behalf of his daughter. But in *Clay's Case* there can be no possible doubt that the insurer intended the moneys to go directly to his adopted daughter if she were alive and his wife dead when they became payable. Consequently the analogy is not a very good one.

Nevertheless the decision stands, and has been followed (though by the same learned judge) in *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124. There S. took out an endowment policy on his own life for the benefit of his godchild, to whom, at the expiration of seventeen years, the policy moneys were to be paid; but if, before this time, the godchild died, they were to be repaid to S. or his estate. S. died before the policy matured, and in accordance with its terms, it was continued to maturity without further payment of premiums, when the moneys were paid into Court to await a decision whether the godchild, who was still an infant, or S.'s estate was entitled to them. Farwell, J., held that S. had not constituted himself a trustee for the godchild, and that the moneys remained part of his estate, a decision at which he expressed regret, for it was common ground that S. intended the policy to be for the benefit of the godchild, and he had no doubt that "had S. lived till the policy matured, the money would in fact have got into the possession of the infant."

In view of these two cases, it must be taken as settled that The Married Women's Property Act will be strictly construed on this point, and further that there is no place here for the operation of the "trustee" principle of equity. Why this should be so it is hard to say, for it was undoubtedly the realisation by Parliament that it was desirable for persons to insure their lives for the benefit of those to whom they stand *in loco parentis* that led to the passage of the sections we have been discussing. It has been repeated again and again, mainly in the Chancery Division, where the judges are, by training, perhaps even more conservative than most lawyers, that apart from these Acts, a simple declaration that a policy is for the benefit of another will not give that person any interest in the policy.¹⁶ The insured can, it is true, effect this object by incorporating in the policy a properly worded declaration of trust, but it has been truly pointed out that the average man does not consult his solicitor as to the language of a life policy, and some simple but effective provision is necessary. Farwell, J.'s decision

¹⁶ See, however, *post* p. 275.

that the protection of the existing Act is to be strictly limited to lawful children of the assured is out of harmony with modern developments in other fields of the law,¹⁷ and a wide extension of the present benefits to other persons is needed.

But there are two other cases which should be mentioned before entering upon a discussion of proposals for revision of the law. The first is the rather remarkable one of *Cleaver v. Mutual Reserve, etc., Association*, [1892] 1 Q.B. 147, which concerned a policy taken out by a husband after 1882, under which a sum was to be paid to his wife if living at his death, and if not, to his personal representatives. The wife was convicted of murdering her husband, and the Court held the husband's representatives entitled to the moneys. Here it will be observed that the money was to be paid to the wife only if she survived her husband, and, her interest being contingent, public policy prevented it from vesting when it otherwise would. What would have been the position if, as in *Cousins v. Sun Life, etc.* (*supra*), the policy had merely been expressed to have been "for the benefit of my wife," so giving her a vested interest immediately on completion? Would this rule of public policy have divested her title, or would her assignee have been entitled to the money? This is a point which was not considered by the Court of Appeal in *Cleaver's Case*, and it might be argued in such a case that the wife was not seeking to *obtain* something by her crime, but merely to accelerate the reduction into possession of something already vested in her. Lord Hanworth in *Cousins' Case* said:

"It would seem from those words" (the reference to the Act of 1882, which was similar in both cases) "that she took a vested interest in the policy moneys when the policy was created, and I have looked in vain for any statement introducing a contingency to negative the creation of a vested interest in favour of the named wife." (At p. 134.)

But in spite of that, common sense urges that the decision in *Cleaver's Case* is correct, and it is submitted that a similar verdict in the hypothetical case suggested could be supported too, on the ground that the trust created by the policy would become unlawful and unperformable on the wife's crime, and the subject matter of the trust would result to the creator, or in this case, to his representatives.¹⁸

¹⁷ E.g. adopted and even illegitimate children are now permitted to benefit under the Fatal Accidents Act (1846), and the Workmen's Compensation Act, 1925. See *Halsbury* (Hailsham edn.), Vol. XVII, pp. 584-5 for references. The Inheritance (Family Provision) Act, 1938, extends to adopted children.

¹⁸ This view is supported by *Re Pitts*; *Cox v. Kilsby*, [1931] 1 Ch. 546, and *Re Sigsworth*; *Bedford v. Bedford*, [1935] Ch. 89: *q.v.*

The other, a recent case which shows a much more liberal attitude than many mentioned above, was *Re Gladitz; Guaranty Executor Co. v. Gladitz*, [1937] Ch. 588, in which Bennett, J., decided that an accident insurance policy, providing for payment only if the insured died in certain circumstances, was a life insurance policy, and also that a memorandum on the policy noting that all claims should be payable to the wife, if she were alive, was sufficient to bring the policy within the Act. The insurer promised payment not only on the death of the insured, but also on his suffering certain injuries; but the memorandum, it should be noted, referred to "all claims under the policy." A question that was not discussed was whether, on the husband's suffering the type of injury insured against but still living, he or his wife would be entitled to receive payment from the insurer. The learned judge said, "The claim of the wife rests on the provisions of s. 11 of the Married Women's Property Act, 1882," which was perfectly true, and if on his death the policy was held by virtue of that Act to amount to a declaration of trust in her favour, surely in the absence of something excluding such an interpretation, the policy should have the same effect in all cases, whether the insured were alive or dead. And if that is the case, it seems that the oft-repeated statement that apart from relationships arising under the Act, a recital in a policy that it is made for the benefit of another has no effect, cannot be regarded as universally true; and that when those words can be shown, either by reference to the Act or otherwise, to mean that the insured intended to create a trust for that other, whatever be the relationship between them, there may be occasions when the Court will uphold that other's right to the policy moneys.

We may now turn our attention to the Law Revision Committee's recommendations. Pages 25-30 of their Sixth Interim Report¹⁹ are devoted to a discussion of third-party contracts in general, and though in the end they report that they are not in favour of a general extension of the "trustee" principle to meet the difficulties of third parties, they arrive at the conclusion that that principle is the best way to settle such problems as arose in *Re Engelbach's Estate* (*supra*). From one point of view this is surprising, for life insurance was one of the fields in which equity resolutely refused to adopt this principle²⁰; but a little consideration shows that their general recommendation²¹ would not be altogether satisfactory for this type of insurance policy, where

¹⁹ Cmd. 5449.

²⁰ See *ante*.

²¹ Which adopts the principle of giving a right of action by assignment rather than by the use of a trust.

simplicity is essential. The main difficulty in *Engelbach's Case*, as the Report points out, was that the policy there was not expressed to be for the benefit of the child, and legislation on the lines of the general recommendation would not have helped her claim. Consequently they recommend that

"the provisions of s. 11 of the Married Women's Property Act, 1882, should be extended to all life, endowment and education policies in which a particular beneficiary is named."

This is a dual extension of the equitable trustee principle as adopted by s. 11 of the Married Women's Property Act, 1882, namely

(1) as regards the type of policy; to include all life, endowment, and education policies, and

(2) as regards the beneficiary; to cover any policy of the above types "in which a particular beneficiary is named."

This last word is highly suggestive, but it is not absolutely clear what the Committee meant by it. Is it their intention merely to widen the scope of that section so as to bring within its terms persons other than the spouse and children of the insured? Or do they intend to widen its language so as to include also any beneficiary who is merely *named* and no more? The ambiguity lies in the word "beneficiary," for they have not made it clear whether they regard as such only a person for whose benefit a policy is expressly said to have been made, or also one who is merely named in the policy, as in *Engelbach's Case*. It is submitted that the latter is the more likely answer, for two reasons—

(1) The declared object of this special recommendation was to overcome the difficulties in cases like *Engelbach's*, and it is only this interpretation that will do so.

(2) The language of that section is "a policy . . . *expressed* to be for the benefit of . . ." etc. In what way does this differ from a contract which "by its express terms purports to confer a benefit . . .," etc. (being the language used in their general recommendations)? And if the law regarding a beneficial insurance is to be exactly the same as that governing any other type of beneficial contract, why bother about making a special recommendation to deal with it?

If this submission is correct, legislation implementing the Committee's recommendation on this point will immensely widen the scope of what can really no longer be called "family" policies;

not merely so as to include classes of beneficiaries which the present Act does not cover, but also in respect of those which the present Act does cover. The result will be a statutory extension, to limits unattainable by equity, of that trustee principle which the Committee unanimously agreed should not be extended generally.

A. M. FINLAY.

SURVIVAL OF CAUSES OF ACTION

Introductory

THE object of these notes is to consider the effect of the wide general principle relating to survival of causes of action where one of the parties is dead laid down in s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, on certain specific causes of action. The object of this statute was to free English law from the trammels of the archaic and inconvenient principle that *actio personalis moritur cum persona* which, apart from most actions based on contract and subject to certain statutory exceptions, caused the abatement of all personal actions on the death before judgment of either plaintiff or defendant. To effect this purpose the Act provided that on the death of a person on or after 25 July, 1934, all causes of action (other than for defamation, seduction, inducing one spouse to leave or remain apart from the other, and adultery) subsisting against or vested in him, survive against or for the benefit of his estate. It will be seen that the Act is in the widest terms and *prima facie* would seem to operate to save causes of action which abate, not as a result of the operation of the maxim *actio personalis moritur cum persona*, but for some other unconnected reason. It is submitted, however, that a narrower construction of the Act must be taken in accordance with the rules laid down in *Heydon's Case*.¹ The Act was passed to remedy a particular mischief and defect in the Common Law and ought not to be given a wider construction than is necessary for that limited purpose.²

1. Breach of Promise of Marriage

Under the law in force prior to 25th July, 1934, the action for breach of promise of marriage gave rise to some difficulty. The difficulty lay in the anomalous and hybrid character of the action. The action is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong; damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to solace the injured feelings of the plaintiff and to punish the defendant in an exemplary manner.³ These peculiar characteristics became of prime importance in considering whether an action was maintainable against the estate of the deceased promisor or by

¹ 3 Co. Rep. 8 (a).

² Cf. *In Re C.*, [1937] 53 T.L.R. 995, where Luxmoore, J., gave a limited construction to the words "prohibited degrees of consanguinity" in s. 2 (1), of the Adoption Act, 1926, in the light of the policy of the Act.

³ Cf. Bowen, L.J., in *Finlay v. Chirney*, 20 Q.B.D. at p. 504.

the personal representatives of the deceased promisee. From an early date it has been recognised that the maxim *actio personalis moritur cum persona* had no application to actions based on contract. Thus, in *Wheatley v. Lane*⁴ it was said that "the maxim never extended to personal obligations founded on any obligation, contract, debt, covenant or any other duty to be performed." On the other hand, even a breach of contract would die with the parties if and so far as it was a purely personal injury without any direct or consequential pecuniary loss.⁵ It was substantially on this principle that Lord Ellenborough, C.J., in *Chamberlain v. Williamson*⁶ refused to allow an action for breach of promise of marriage to be sustained by the personal representatives of the deceased promisee. "Executors and administrators are the representatives of the temporal property, that is the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. . . . Marriage may be regarded as a temporal advantage to the party as respects personal comfort, still it cannot be regarded in this case as an increase in the individual transmissible personal estate."⁷ The learned Chief Justice then threw out a suggestion which was later to prove troublesome, viz. that the action might be sustainable if "special damage"—in the sense of injury to property—were alleged and proved.

In *Finlay v. Chirney*⁸, and again in *Quirk v. Thomas*,⁹ the Court of Appeal held that the right of action abated with the death of the promisor, but in each case the Court gave reluctant recognition to the principle that the action might be sustained if "special damage," and not merely general personal damage, were alleged and proved. The two cases, therefore, are largely concerned with the question as to what may be said to be special damage arising from the breach.

Now, in assessing the general damages in an action *inter vivos*, there are a number of circumstances which the jury may take into account to swell the measure of damages, such, for example, as the fact that the plaintiff, on the strength of the promise, has given up profitable employment, or has been seduced, or has purchased articles necessary for married life. It is unnecessary for this purpose to prove that such loss arose directly from the breach, or in fact, any chain of causation at all. But when one

⁴ 1 Wms. Saund. 240.

⁵ See *Bradshaw v. L. & Y. Railway Co.*, L.R. 10 C.P. 189.

⁶ 2 M. & S., 408.

⁷ Per Lord Ellenborough, C.J., *Chamberlain v. Williamson*, 2 M. & S. 408.

⁸ (1887), 20 Q.B.D. 494.

⁹ [1916] 1 K.B. 516.

of the parties had died and it was necessary to allege these matters as "special damage" it became necessary to shew:

- (a) that the loss arose from the breach;
- (b) that it fell within the rule in *Hadley v. Baxendale*¹⁰, i.e. that it arose normally, according to the usual course of things, from the breach, or was such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it.

At the present day the position differs according as to whether it is the promisor or the promisee who has died. If the wrongdoer (promisor) dies his estate is liable for precisely the same damages as he would have been liable for; but if the injured party (promisee) dies the damages recoverable for the benefit of his/her estate are limited to such damage, if any, to the estate as flows from the breach.¹¹ The result of this limitation would appear to be that in actions by the personal representatives of the promisee the legislature has adopted the criterion set up by the pre-1934 cases under the rather inaccurate description of "special damage." It is true that on the wording of the Act any damage to the estate which flows from the breach is recoverable, but there is nothing to exclude the ordinary rules of remoteness, which, in the case of an action for breach of contract, are those laid down in *Hadley v. Baxendale*. It may be useful therefore to consider the cases prior to 1934 with a view to determining what damage to the estate may be recovered as "special damage."

In *Finlay v. Chirney* the plaintiff alleged the following heads of special damage:

- (a) money laid out in the purchase of a trousseau;
- (b) maintenance of the plaintiff from the date of the promise until the date of the death of the promisor;
- (c) costs occasioned by the birth of a child—the plaintiff having been seduced on the strength of the promise of marriage—and the cost of maintaining the child until the age of 16;
- (d) the amount of a legacy which the plaintiff would have received from her mother but for the disgrace attendant on the birth of the child;
- (e) the amount of a Poor Law grant in respect of other children of the plaintiff which was withdrawn for the same reason.

The Court of Appeal nevertheless came to the unanimous

¹⁰ (1854), 9 Ex. 354.

¹¹ Law Report (Miscellaneous Provisions) Act, 1934, s. 1 (2) (b).

conclusion that special damage arising from the breach had not been proved. Lord Esher thought that the purchase of a trousseau could never be special damage as it is no concern of the prospective husband; Bowen and Fry, L.JJ., thought that such damage might be recoverable if the outlay were contemplated by the parties at the date of the contract. The cost of maintaining the plaintiff was not recoverable because it did not arise naturally from the breach nor was it within the second branch of the Rule in *Hadley v. Baxendale*. No damages could be awarded for the seduction since this injury did not arise naturally from the breach and could not be the subject of an enforceable agreement because any such agreement would be contrary to public policy and illegal. The loss of the legacy and the Poor Law grants were also quite clearly too remote.

In *Quirk v. Thomas* the plaintiff alleged as special damage her having given up a profitable business at the request of the deceased and in consideration of his promise to marry her.

The Court of Appeal held that this allegation failed because the loss did not arise from the breach of promise to marry; the business was not lost because the deceased refused to marry the plaintiff. Indeed the business would have gone if the promise had been carried out. The only relevance which the giving up of the business could have had was as a circumstance which would have operated to aggravate the injury and swell the general damages. The fact that it formed part of the consideration for the promise to marry is immaterial for the consideration given, for a promise is not the measure of damages for a breach of the promise. *Riley v. Brown*¹² is merely another illustration of the application of the principles laid down in the earlier cases and adds nothing of importance to them. There the plaintiff gave up remunerative employment in order to nurse the promisor; she also left her lodgings and took a flat and, when the promisor repudiated his promise, she incurred expense in disposing of the flat. All these matters took place after the promise to marry had been made and Romer, J., held that the damages alleged were not sufficiently connected with the promise to constitute special damage and therefore to support an action against the personal representatives of the deceased promisor.

These difficulties still have to be faced at the present day and it is only in the most exceptional cases, therefore, that an action will be maintainable for the benefit of the estate of the deceased promisee. Of course circumstances can be imagined when the necessary damage could be proved, but they seem hardly likely

¹² 98 L.J.K.B. 739.

to arise in practice, unless the marriage proposal is to be invested with a rather more prosaic and material character than hitherto. Thus suppose that the promisee would qualify for a legacy if she married X; then if X promised to marry her, and at the time of the promise the special circumstances relating to the legacy were brought to his notice, then it is conceived that if X subsequently repudiated his promise the amount of the legacy might be recoverable. Again if A had been promised an appointment open only to married women and had then become engaged to marry X, then the loss of the employment would flow from the breach and damages for the loss if not too remote would be recoverable. A more feasible case is when money is laid out on a trousseau or articles for use in the home, always provided of course that such expenditure was contemplated by the parties at the time of the promise.

It is rather difficult to see why the legislature should have chosen to discriminate against this particular personal wrong and no other, and in any case it is to be regretted that the section is so framed as to perpetuate a difficulty which seems well-nigh insuperable and often unjust. A rather more satisfactory expedient would have been to say that the damages recoverable should be the same as if the promisee had been alive and suing save that any part of the general damages attributable solely to the purely personal injury to the plaintiff should be deducted. The effect of such a provision would have been to exclude questions of causation and remoteness. It might have involved a difficult calculation but it would have avoided the patent injustices which may arise under the law as it stands.

2. Action under the Companies Act, 1929, s. 276

Prior to 1934 it was quite clear that an action for damages for misrepresentation or negligence did not survive against the personal representatives of a deceased director of a company except insofar as the estate of the deceased director had benefited directly from the misrepresentation or negligence.¹³ Furthermore, in *Geipel v. Peach*¹⁴ it was held that the liability of directors, promoters, etc., under s. 84 of the Companies (Consolidation) Act, 1908 (now replaced by s. 37, Companies Act, 1929) is a liability in tort and thus fell within the *actio personalis* rule. In *Felton's Executors' Case*,¹⁵ it was held also that the executors of a deceased delinquent director could not be proceeded against under s. 165,

¹³ *Peek v. Gurney*, L.R. 6 H.L. 377; *Overend, Gurney & Co. v. G.*, L.R. 4 Ch. 701; L.R. 5 H.L. 480.

¹⁴ [1917] 2 Ch. 108.

¹⁵ L.R. 1 Eq. 219.

Companies Act, 1862 (now Companies Act, 1929, s. 276). There is, however, an important difference between these two cases; in *Felton's Case* the action failed, not as a result of the operation of the maxim *actio personalis moritur cum persona*, but because the Court was of opinion that on the construction of the particular section it could not be held to apply to the executors of a deceased director. The section provides in effect that if in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company or any past or present director, manager, etc., has been guilty of any misfeasance in relation to the company the Court may examine into his conduct and compel him to pay or restore the money he has misapplied, etc. Sir Richard Kindersley, V.-C., carefully analysed the section and came to the conclusion that it was not available against the executors of a delinquent director. The learned Vice-chancellor laid particular emphasis on the use of the words "compel him to pay"; these words did not appear in s. 101 of the Act, which expressly included executors or administrators who are contributories. The words used in that section were: "make an order directing payment to be made"; the words "compel payment" were not used because the Court cannot compel payment by personal representatives of anything which is payable out of the estate of the deceased. It cannot in the winding up administer the estate of the deceased, all that it can do is to make an order directing payment to be made out of the deceased's estate. In *Re British Guardian Life Assurance Company*,¹⁶ Hall, V.-C., also came to the conclusion that "there is a total absence of power to investigate the conduct of a dead man under [the section]."

For the reasons pointed out in the introductory paragraph to these notes it is submitted that the Act of 1934 has not impaired the validity of these decisions.

3. Liability under a Bastardy or Maintenance Order

In *Re Harrington*, a bastardy order had been made against a putative father who subsequently died while the order was still in force. The mother thereupon brought an action against his personal representatives to recover £37 arrears and £120 which was the sum which would have been payable until the time when the child attained the age of sixteen years. Warrington, J., admitted that if this had been an action to recover an ordinary debt the action would have been maintainable. But it is a well-recognised principle of law that if a statute imposes an obligation

¹⁶ 14 Ch. D. 335.

¹⁷ [1908] 2 Ch. 687.

and at the same time prescribes a certain method for its enforcement then it cannot be enforced by ordinary process of law. Now s. 4 of the Bastardy Laws Amendment Act, 1872, which confers power to make the order also contains elaborate provisions for its enforcement. It provides for the putative father being brought up before the magistrates and if he refuses to pay an order may be made for the amount to be recovered by distress and sale of his goods and chattels. If there is no sufficient distress then he may be committed to gaol for a period not exceeding three months. These remedies quite clearly predicate the existence of the putative father and are quite inappropriate to an action against his estate. It was held, therefore, that the action, both for the arrears and for future payments failed.

It is perhaps doubtful whether in *Re Harrington* can be supported in so far as it dealt with the arrears. For the learned judge's attention was not directed to s. 6 of the Summary Jurisdiction Act, 1879, which provides that "where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a debt recoverable summarily is recoverable under this Act." Thus, as far as arrears are concerned,¹⁸ it would appear that the procedural difficulties which were the basis of the decision in *Re Harrington* are not decisive, and that even before 1934 it should have been possible to recover arrears against the estate of the defaulter. The position at the present day, it is conceived, is exactly the same, viz. that no action to enforce the order against the personal representatives of the putative father would succeed owing to the nature of the particular proceedings, but an action for arrears would be maintainable.

An order against a husband for the maintenance of his wife is on quite a different footing from an affiliation order, even though it is provided by statute¹⁹ that a maintenance order shall be enforced in the same way as an affiliation order. The liability of the husband to maintain his wife, or pay money for her maintenance, is, unlike a father's liability to support his children which is the creation of statute, a common law liability, whether payable as alimony or by virtue of a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895. The mode in

¹⁸ Cf. *L.C.C. v. Betts*, [1936] 1 K.B. 430; N.B. particularly, *per du Parcq, J.*, at p. 349.

¹⁹ Summary Jurisdiction (Married Women) Act, 1895, s. 6.

which payments are to be made does not affect the nature of the husband's liability. It has, therefore, been held²⁰ that *Re Harrington* has no application to maintenance orders; when a separation order has been made by justices under the Summary Jurisdiction (Married Women) Act, 1895, against a husband and also an order for maintenance his widow may recover against his estate arrears of maintenance due under the order at his death. Alimony is also "a judicial assessment of the husband's obligation to maintain his wife," and the widow may recover any arrears of alimony due at his death.²¹

So far we have been considering actions against the estate of the defaulting father or husband. There is also the converse case, where the mother or widow dies and at the time of her death arrears are due under the order. Obviously, the death of the mother cannot affect the husband's liability under an affiliation order and the difficulties which had to be met in *Re Harrington* do not arise where the defendant is alive. Arrears due under a maintenance order and arrears of alimony are quite clearly recoverable by the personal representatives of the deceased wife.

4. An Action for the Recovery of Penalties

In *Att.-Gen. v. Canter*,²² the deceased had incurred liabilities to the Inland Revenue in respect of incorrect statements made in his returns of income tax. As a result, he became liable under the Income Tax Act, 1918, s. 30 (1) to forfeit by way of penalty to the Crown considerable sums of money. No proceedings were taken against him during his lifetime but proceedings were commenced against his executrix in 1937. The question was whether the cause of action by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), was made to survive against his estate and whether such proceedings were in respect of a cause of action in tort within the meaning of s. 1 (3) of the Act, in which case the action would have been barred since it arose more than six months before the death and proceedings were not commenced until more than six months after representation was taken out.

Lawrence, J., held that "the words of s. 1 are perfectly general and included every cause of action subsisting against a person at the time of his death." We have already given reasons for doubting the literal accuracy of this statement, but there seems no reason to doubt that the Act is in terms wide enough to cover a case of this kind.

²⁰ *Firman v. Royal*, [1935] 1 K.B. 681.

²¹ *In re Stillwell*, [1916] 1 Ch. 365.

²² [1938] 2 K.B. 826.

The second point was rather more difficult owing to various dicta to the effect that the action for the recovery of a penalty is an action in the nature of a tort. Lawrence, J., cited with approval a passage from *David v. Britannic Merthyr Coal Co. Ltd.*,²³ where Fletcher Moulton, L.J., distinguishes an action for breach of statutory duty from an action to recover a penalty imposed by the statute for the breach of the duty:

"The civil liability arising from the breach of a statutory duty is of a wholly different nature from a penalty for such breach. The former gives no cause of action unless damage to a third party follows from it, and then it, in general, gives ground for an action for the amount of such damage at the suit of such third party. But penalties for breaches of statutory duties apply whether damage has been caused or not. Their very object is to punish the act itself and thus prevent its commission, whether damage follows or not. . . ."

An action for penalties is an action for a debt created by the statute and is not a cause of action in tort and therefore does not come within the ambit of the time restrictions of s. 1 (3). The distinction is fortified by the fact that under the forms of action debt would lie for the recovery of a statutory penalty. An interesting argument in support of the survival of the action can be drawn from the survival legislation of the State of New Hampshire, U.S.A. There a general provision similar to the English Act was made, but with a specific exception of actions for the recovery of penalties and forfeitures of money under penal statutes. The express exception is strong support for the view that the general provision causes the survival of these actions.

E. WYNDHAM WHITE.

[The Court of Appeal has now affirmed the decision of Mr. Justice Lawrence in *Att.-Gen. v. Canter*, [1939] 1 All E.R. 13. The Master of the Rolls used language decidedly inimical to the view expressed in these notes. In his view the abolition of the *actio personalis* doctrine was only one of the objects of the Act, "since its language extends to include causes of action such as those arising *ex contractu* to which the doctrine did not apply. In this sense, it may be said to form a code in relation to the survival of causes of action for the benefit, or to the prejudice, of estates of deceased persons." These remarks would seem to be *obiter dicta* and it is submitted that had the cases adduced been present to the mind of the Master of the Rolls he would have qualified his remarks.]

²³ [1909] 2 K.B. 146, 160.

RECOGNITION AND SOVEREIGN IMMUNITIES

A civil war may present the dilemma of two governments claiming control over the same territory, the one being recognised *de facto* and the other *de jure*. In such circumstances the courts may be forced to regard the administrative and legislative acts of the one as operative to the exclusion of the acts of the other, in relation to a particular area or matter. Clauson, J. was confronted with this problem in *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] Ch. 513, where it was decided that the *de facto* government "must for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognised foreign sovereign state," whilst the *de jure* monarch has merely "some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived."

Substantially this same question came before the Court of Appeal in *Banco de Bilbao v. Rey*, [1938] 2 K.B. 176, and resulted in a parallel decision delivered by the same judge. The somewhat complicated facts leading to the dispute are as follows. The plaintiff bank was domiciled at Bilbao, and controlled by a board of directors elected in the usual way. The defendants had for many years acted as managers of the London branch. On 6th October, 1936, the Basque country became an autonomous régime within the Spanish State, and in December a decree of the new Basque Government placed the bank under the control of a new and partly nominated board. The new board was desirous of obtaining control of the London branch, and, in due course, one Albisu presented himself at the London office with documents purporting to transfer to him all power to act on behalf of the bank. The defendants refused to hand over the branch to Albisu, and continued to act for the bank. Accordingly, an action was begun to restrain them from so acting. At the trial before Lewis, J. it was held that according to the Spanish Constitution the decrees of the Basque government were ineffective to pass control of the bank to the newly constituted board. The plaintiff bank gave notice of appeal. Meanwhile, events in Spain moved rapidly. On the approach of General Franco's forces the new board left, with their documents, for Barcelona, and in June, Bilbao was occupied by the insurgent forces. Two decrees were then issued by the Republican government, in August and September respectively, according to which the domicile of the plaintiff bank was deemed to have been transferred to Barcelona, and the decrees of the Basque Government, which had been found invalid by Lewis, J., were validated retrospectively. The Insurgent Government countered in December with decrees, the effect of which was to nullify the decrees of the Republican Government, and any acts purporting to change the status of the bank after July, 1936. In these altered circumstances the appeal from Lewis, J. came before the Court of Appeal, the plaintiffs now relying on the alleged validation of the acts of the Basque Government by the subsequent decrees of the Republican Government. The appeal failed. It was held that the question of what body of directors had the legal right of representing the bank must depend on the articles under which it was constituted. Those articles must be interpreted according to the *lex loci contractus*, i.e. "the law from time to time prevailing at the place where the corporate home was set up." What that law

was, was a question to be answered by His Majesty's Government. The only difficulty arose from the fact that His Majesty's Government recognised the Republican Government as the *de jure* government of the whole of Spain, whilst recognising the Insurgent Government as the *de facto* government of that part of Spain in which Bilbao was situated. But it was clear, observed Clauson, L.J. that "this Court is bound to treat the acts of the government which His Majesty's Government recognise as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognised by His Majesty's Government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts." Leave was given to appeal to the House of Lords.

The problems raised by the decision of the House of Lords in *The Cristina*, [1938], 1 All E.R. 719; 54, T.L.R. 981, have already been noted in this volume (at p. 57). In that case Lord Atkin restated two well-known propositions of international law which have been "engrafted on to our domestic law." The first is that the courts of this country will not make a foreign sovereign a party to proceedings against his will, "whether the proceedings involve process against his person or seek to recover from him specific property or damages." The second is that "they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control." His Lordship draws attention to the fact that these are two distinct immunities which often tend to become confused, and adds very truly that "it is not always clear from the decisions whether the judges are dealing with one or the other or both." This confusion seems to arise mainly from the operation of the writ *in rem*. It was pointed out by Brett, L.J. in *The Parlement Belge* (1880), 5 P.D. 197, that the procedure of the writ *in rem* is not a proceeding solely against the property but a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. Thus, where a writ *in rem* is issued against the *res*, it may be necessary to decide whether the sovereign is not himself impleaded by the writ. To decide this question it will be necessary to inquire into the nature of his alleged interest in the *res*, and this is apt to look very like an inquiry directed to the establishing of the second proposition laid down by Lord Atkin, the gist of which is the interest which the sovereign has in the *res*. So much so that the tests proper to the one inquiry have been applied to the other, and *vice versa*, with the result that the limitations applicable to both have been widened almost beyond recognition.

There is still another and perhaps more potent source of confusion. In *The Parlement Belge* Brett, L.J. pointed out that where the sovereign declares that the vessel is dedicated to "public uses" (i.e. that it is covered by Lord Atkin's second principle), "it seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction," i.e. to invoke the first principle. It is difficult to see any escape from the logic of this argument, but the result is that in the great majority of cases the court cannot begin to inquire into the application of the second principle without thereby committing a breach of the first. Thus, many of the cases ostensibly decided on the second principle are

really decided on the first principle which has come in, as it were, by the back door.

One of the vessels involved in *The Cristina* case was the *Arraiz*. In that case the judgment of the House of Lords set aside the arrest and the writ for possession issued by the owners of the vessel, on the ground that as she had been requisitioned by the Spanish Republican Government, the writ and arrest impleaded that government, a foreign sovereign state. The Nationalist Government now issued a further writ for the arrest of the *Arraiz*, claiming possession on the ground of *their* attempted requisition, and because she was registered in Bilbao, then under their *de facto* control. The Republican Government moved to set aside this second writ on the ground that it impleaded a foreign sovereign government, stating that they were still unwilling to submit to the jurisdiction. The case was tried before Bucknill, J. who had been the judge in *The Cristina* in the court of first instance. (*The Arraiz* (1938), 61 Ll.L.R. 39.) Counsel for the plaintiffs attempted to distinguish the case from *The Cristina* on three grounds, in respect of all of which the court found against him. In the first place it was argued that here the writ was in different form. It was addressed not to the owners and parties interested in the vessel, but to the steamship *Arraiz*, and to the master of the vessel. But it was held by Bucknill, J. that the writ still impleaded the Republican Government, even in this amended form. They were in fact in possession of the vessel through the master who acted for them and they had filed affidavits showing that they had "an abundant interest in the *res*." There was, accordingly, no ground for distinguishing the case from *The Cristina*, merely because the form of the writ was somewhat different.

Secondly, it was said on behalf of the plaintiffs that it had never been proved that the *Arraiz* was destined for public uses. But it was admittedly requisitioned under the decree which had already been examined by the House of Lords in *The Cristina*, and their finding must be taken as conclusive on this point.

Thirdly, it was pointed out that *The Cristina* had been argued on the footing that the Republican Government was the only government recognised in Spain. Affidavits were now put forward by the Nationalist Government to show that they themselves had issued decrees purporting to requisition the vessel, and that the owners of the steamship recognised and acknowledged the validity of that requisition. The vessel being registered in Bilbao, it followed from *Banco de Bilbao v. Rey* that the Nationalist Government was the proper authority to pass enactments and decrees relating to a vessel registered within its zone of recognition. The court pointed out the irrelevance of this proposition. The judge said:

"If it was the duty of this Court to decide as to the validity of the decree of the Spanish Republican Government in June, 1937, requisitioning the *Arraiz*, and the validity of the decree of the Nationalist Government of Spain of March, 1938, requisitioning the *Arraiz*, of course the matter would be debated in the course of this case. But it seems to me that to ask the Court to do that would be to ask the Court to do the very thing which the House of Lords has said must not be done, because it would involve the impleading of the Republican Government of Spain, which is to-day, and certainly was on Mar. 18th, 1938, the government of a foreign Sovereign State, and the government which is, in fact, in possession of the *Arraiz*. It does not seem to me in any way to affect the point that the plaintiffs themselves happen to claim also to be a Sovereign State, or at any rate a State exercising *de facto* the administrative control over the port of Bilbao."

However, even after the comprehensive judgments in the House of Lords

and the careful judgment of Bucknill, J. the ingenuity of counsel was apparently not exhausted. Yet another attempt to evade the principles of *The Cristina* was made in *The Arantzazu Mendi*, [1938], P. 233. The *Arantzazu Mendi* was registered in the port of Bilbao. She arrived in London on 11th August, 1937, some two months after her port of registration had fallen under the control of General Franco. A requisition decree had been issued by the Republican Government as early as June, and, after her arrival in London, the owners issued a writ *in rem* for the arrest of the vessel. In March, 1938, she was requisitioned by the Nationalist government, and notices of requisition were subsequently served on the owners by both governments. The owners thereupon declared that they submitted freely to the requisition by the Nationalist Government. The writ issued by the owners was discontinued, but the ship was not allowed to depart from London owing to the failure to pay certain charges incurred during arrest. The Republican Government now issued a writ for possession of the vessel, joining the master of the vessel as defendant, and the ship was again placed under arrest. The Nationalist government moved to set aside this second writ on the usual ground that it impleaded a foreign sovereign State unwilling to submit to the jurisdiction. The usual inquiries were made at the Foreign Office, from which it appeared that the Republican Government was recognised by His Majesty's Government as the *de jure* government of the whole of Spain, whilst the Nationalist Government was recognised as the *de facto* government of that part of Spain which included Bilbao, and was not subordinate to any other.

Counsel for the Republican Government took the line that sovereignty was quite distinct from administrative control, and that there could not be concurrent sovereignties over the same territory. Accordingly, a recognition *de facto* did not import the attributes of sovereignty, at any rate where another government was recognised *de jure* in respect of the same area. Secondly, it was submitted that the Nationalist Government was not in actual possession of the vessel, but merely asserted a right to control, under their requisition order. The case was tried before Bucknill, J. who held that the writ and arrest must be set aside.

The greater part of his judgment was directed to disposing of the submission by counsel that the recognition of *de facto* administrative control did not necessarily import the attributes of sovereignty. He cited *The Gagara*, [1919] P. 95 as authority for the proposition that *de facto* recognition carries with it the immunities of a sovereign state, whilst the objection that in *The Gagara* there was no rival government was held to have been disposed of in *Banco de Bilbao v. Rey*.

"It may seem a contradiction in terms that there should be two sovereign governments in Spain, where formerly there was only one such state, but I think that there may be, in the eyes of the law, two sovereigns, one *de facto* and one *de jure*, in the same country. It seems to me that the law, based on the reality of facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question and not subordinate to any other government, because their decrees are the only legal authority which governs the area to which the subject matter of the dispute belongs. This is the result in my view of the decision of the Court of Appeal in the *Banco de Bilbao* case."

Moreover, the immunities laid down in *The Cristina* were based on the possibility of reciprocity, and the Nationalist Government appeared to be in a position to grant such reciprocity.

With regard to the argument that the Nationalist Government had not got possession of the ship, and therefore the *Cristina* rule did not apply, the judge said: "In my view the Nationalist Government has done all that it can legally do to obtain possession of the ship consistently with the fact that the ship was already under arrest by warrant of this Court." The Nationalist Government had in fact a limited possession exercised through the ship's master who represented himself as having taken possession for them.

When is a state impleaded by the issue of a writ *in rem* against property? Bucknill, J. in *The Arantzazu Mendi* said that the Nationalist Government was impleaded by the action "as a party interested in the *res*." What is a sufficient interest? The point has recently had the attention of the Court of Appeal in *Haile Selassie v. Cable and Wireless Ltd.* [1938] 3 All E.R. 385, where it appears to have been held that a mere claim to property is not sufficient to enable a state to show that it is indirectly impleaded. "It would be a strange result," observed Greene, M.R., "if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign." It is important to note that the Italian Government was not actually a party to these proceedings. Its claim appeared before the court merely as an item in the defence put forward by the defendant.

R. Y. JENNINGS.

[Since this note was written the Court of Appeal has upheld the judgment of Bucknill, J. in the *Arantzazu Mendi*, ([1938] 4 All E.R. 267). Here, the question whether the Nationalist Government had a sufficient interest in the vessel to cause it to be impleaded by the writ, was more fully dealt with. It was admitted that they had neither ownership nor possession, the latter being at all material times in the Marshall of the Admiralty Court. Nevertheless, said Slessor, L.J. they did have a "lesser interest," imposed by the requisition, and held for their benefit by the master and owners. This was a sufficient interest for the Nationalist Government to be compelled, unless they wished to see that interest destroyed, to come before the Court and defend it.

R. Y. J.]

COMMON EMPLOYMENT

A VINDICATION

This admirable Journal, in the course of its first two volumes has devoted no less than three articles to damning the doctrine of common employment. Dr. Robson¹ has reflected that "the time has clearly come when the doctrine of common employment should be abolished." Mr. Gold² has discovered that it is merely a judicial way of assisting the Capitalist to grind the faces of the poor. Mr. Unger³ adds his strictures in the light of two recent decisions⁴ which he finds even less

¹ Vol. I, pp. 224-5.

² Vol. I, pp. 225-30.

³ Vol. 2, pp. 43-48.

⁴ *Radcliffe v. Ribble Motor Services Limited*, [1938] 2 K.B. 345; *Metcalf v. L.P.T.B.*, [1938] 54 T.L.R. 678.

to his taste than the old ones. Nor can one feel surprised that the critics, whose function it is to criticise, should now be massing their forces in the light of the exploratory work carried out over the hostile lines by holders of high judicial office. Lord Wright⁵ and the late Lord Justice Scrutton⁶, to name only two, mapped out the territory with their characteristic acumen and laid bare more than one weak point.

To attempt any sort of vindication in the face of such concentrated hostility is perhaps rash, as so many of the epithets used of the doctrine itself are capable of a personal meaning applicable to the persons who defend it. At the risk, however, of being stigmatised as old-fashioned and illogical and out of touch with reality and modern ideas of economics and industrial conditions, I venture to accept the dock brief and to conduct a defence. After all, even the devil is entitled to a trial and the services of an advocate.

The rule is justified and explained in some of the cases as being a species of *volenti non fit injuria*, with this fundamental difference that, whereas it is a question of fact whether a person who has run a risk did so voluntarily, in the case of a servant it is said to be an irrebuttable presumption of law that *volentia* follows from *scientia*.⁷ In other cases emphasis is laid rather on a term implied in the contract of service. In the words of Baron Alderson⁸ "He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow servants; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk." In the leading case of *Morgan v. Vale of Neath Railway Company*,⁹ Blackburn, J., said: "that principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself as between himself and his master the natural risks and perils incident to the performance of such service; the presumption of law being that the compensation was adjusted accordingly, or in other words, that those risks are considered in his wages. And that, when the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master." More recently Greer, L.J., in *Radcliffe v. Ribble Motor Services Ltd.*,¹⁰ said: "I think it is established that in any contract of service there is implied by law a promise by every employee that he accepts the risk of injury by negligence of his fellow-employees engaged in common employment with him."

These and similar statements certainly invite criticism. The fallacy of saying that *scientia* is the same as *volentia* as a matter of fact has been pointed out by Bowen, L.J.,¹¹ and it is difficult to see why anything which is a fallacy in fact should be presumed in law. Nor is the contractual

⁵ *Wilsons and Clyde Coal Company v. English*, [1938] A.C. 57, 79, *et seq.*

⁶ *Fanton v. Denville*, [1932] 2 K.B. 309, 315 *et seq.*

⁷ *Salmond on Torts*, 9th ed., 1936, p. 107, approved by Scrutton, L.J., in *Fanton v. Denville*, [1932] 2 K.B. 309, 325.

⁸ *Hutchinson v. York, Newcastle and Berwick Railway Company* (1850), 5 Ex. 343, 351.

⁹ (1864), 5 B. & S. 570, 578.

¹⁰ [1938] 2 K.B. 345, 362.

¹¹ *Thomas v. Quartermaine* (1887), 18, Q.B.D. 685, 696.

notion much better. The picture of a coal-miner nicely calculating the risks of injury, like the actuary of an insurance company, in order to fix the wages he should demand, would be quite comic were it not for its appalling pathos. Everybody knows that the workingman takes a job because he has to in order to live and accepts the wage offered by an employer because he knows that, if he does not, another will. What the employer in fact offers will be governed by a variety of considerations such as obligations to shareholders and debenture holders, prices of raw materials, rates of foreign exchange, the consistency or otherwise of the demand for the goods produced, both at home and abroad, the minimum wage demanded by any trade union concerned, and so forth. For the law to step in and say that the coal-miner must be deemed to have incorporated in his contract something which never entered his head is artificial to say the least. In the words of Lord Wright¹² "the principle is stated, with little regard to reality or to modern ideas of economics or industrial conditions, to be that this particular risk is included in the agreed remuneration."

It is to be observed, however, that the statements which have been quoted are not really or merely statements of a rule of law. They are attempts to explain or justify a rule of law by some show of rational deduction. The rule of law is simply that a servant cannot recover from his master damages for injury caused to him by a fellow servant in common employment. In order to justify and explain such a rule, lawyers of the nineteenth century naturally had recourse to an implied term. It was the simple means by which everything not entirely self evident could be fitted into a neat edifice of logical brickwork. Lord Wright himself has shown that precisely the same process was at work in the field of the money counts.¹³ Nowadays, thanks mainly to Lord Bowen¹⁴, the implied term is not in such repute as a panacea as it used to be, but it by no means follows that the rules which it has been used to justify deserve to be discarded.

Theologians have drawn a distinction between the form and the essence. Whether as a matter of theology this is justifiable may or may not be open to dispute, but it is certain that in law such a distinction can and must be drawn. It is a common enough phenomenon that a logical process, used in a particular case to arrive at a particular result, is repudiated by subsequent or superior judges while affirming the decision itself. And, just as a case may be rightly decided for the wrong reasons, so too a rule may be right in essence although the form in which it is expressed or the justification or explanation which is given for it may be quite fallacious. It is submitted that this is so with the doctrine of common employment. The critics of it have made a brave show, but have succeeded merely in showing that the raiment in which the doctrine is clothed is cheap and tawdry tinsel. They have not succeeded in exposing any deformity or disease in the body underneath.

Those who say that "the time has clearly come when the doctrine of common employment should be abolished" are really taking a great deal for granted. They start with a proposition that the law has provided for them, that a master is responsible for the acts of his servant. They do not pause to ask "Why should he be?" They then say that there is no reason why a person should be in any different position from other persons

¹² *Wilsons and Clyde Coal Company v. English*, [1938] A.C. 57, 80.

¹³ See his article entitled "*Sinclair v. Brougham*" in 6 *Camb. L.J.*, 305.

¹⁴ *The Moorcock* (1889), 14 P.D. 64, 68.

merely because he is a servant, but do not pause to ask themselves "Why should not he be?" Yet the whole essence of the situation consists in the answers given to those two questions.

Why is a master responsible for the acts of his servant? Common Law provides the answer by saying *qui facit per alium facit per se*. In other words, if a person chooses, or wishes, to get some deputy to act for him instead of acting himself, he can only do so on the terms that he is not to be in any better position by refraining from acting himself. *Qua* third parties he must be treated as though he were acting himself, and must shoulder responsibility for any acts of his deputy done in the course of his employment. The important element in the whole conception is contained, however, in the words "*qua* third parties." Nobody would ever do anything himself if by appointing a delegate he could avoid all liability, and it is solely to prevent third parties being prejudiced in such fashion that the vicarious liability of a master exists in our law.

The next question to be asked is this: "Is there any reason why a servant should be in any different position?" and the answer must be that there is every reason. The whole foundation for the rule of vicarious liability has disappeared, because there is no question of any third party. The servant can of course always hold responsible the individual who injures him, but he cannot go on to claim payment from that individual's master because that is a step which a third party alone can take. After all, the entity comprised by a master and his servant, whether it be small like a bachelor with a cook and a housemaid, or whether it be vast like the London Passenger Transport Board with its thousands of employees, is none the less a distinct entity by itself, and what goes on within it, and the relations *inter se* of the persons comprising it, are domestic matters differing both in substance and in function from the relations it may have with the outside world, or general public, or in a word third parties.

It follows from this line of argument that the true justification of the doctrine is to be found, not in any promise which an employee is to be deemed to make when he enters into a contract of service, but in the fact of his becoming a servant and thereby ceasing to be a third party. Nor should it be said, in the language of Shaw, C.J., in *Farwell v. Boston & Railroad Corporation*,¹⁵ that "he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such duties," but rather that a person who engages in the employment of another ceases by such engagement to be in the class of persons who can cast upon the master liability for the act of a servant.

Such a statement of the rule brings into the limelight the fact that the limitation is not against suing the actual tortfeasor, but against making a further person pay for the tortfeasor's act. If the tortfeasor is the master himself, the servant can always sue, and the law is at present in process of defining more clearly the range of duties which are incumbent upon the master personally.¹⁶ Similarly the servant can sue if the negligent servant was not in a common employment with him, because he has not to that extent given up his character of third party. So too, a London Passenger

¹⁵ (1842), 3 Macq. 316, 317.

¹⁶ *Wilsons & Clyde Coal Company v. English*, [1938] A.C. 57, omits all reference, curiously enough, to any duty in respect of premises. It can, however, hardly be doubted that the master is personally under a duty to take reasonable care to see that the premises are safe: see *Cole v. de Trafford* (No. 2), [1918] 2 K.B. 523, 527-8, *per* Pickford, L.J.

Transport Board 'bus driver, riding in a London Passenger Transport Board 'bus as a passenger on his Sunday off, would be able to recover if the 'bus were driven into a lamppost, because he would by then have been reinvested in his character as third party. "In such a case the person injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant."¹⁷

It is submitted that the doctrine, for the reasons which have been given, is logical and intelligent, and that the charge of having "little regard to reality or to modern ideas of economics or industrial conditions"¹⁸ is applicable only, and indeed was only intended to be applied, to the justification given for the rule and not to the rule itself.

The implied term has all along been merely a legal fiction, and "the old common lawyers were a robust people, and if a fiction was convenient under the old rigid forms of pleading they did not worry about its correspondence to reality or to juristic concepts. But it does not follow that they did not realise the true nature of the concept."¹⁹ Rigid forms of pleading have gone, but the robust side of the profession still finds fictions a convenient way of making rules of law intelligible, and it still does not follow that they do not realise the true nature of the concept about which they are talking.

To defend the doctrine of common employment is not of course to say that compensation ought not to be paid to the victims of industrial accidents. It is essential for the physical, spiritual and social well-being of the nation as a whole that adequate compensation should be secured to the industrial population, but it has to be realised that industry is a very special field with special problems of its own. It may be doubted whether justice would really in the long run be done by abolishing a rule which has an intelligible and intelligent part to play in English Common Law. The remedy is to be sought rather in bringing the Workmen's Compensation Acts into line with "reality and modern ideas of economics and industrial conditions" and, be it added, of justice.

STEPHEN CHAPMAN.

THE POSITION OF THE INJURED THIRD PARTY

Professor R. S. T. Chorley and Mr. A. M. Finlay in the June number of the MODERN LAW REVIEW take different views of the reasoning expressed in my article upon which they comment. This is why I ask leave to reply to one of them. Professor Chorley says that I appear to be swimming against the stream of modern social legislation but in this he is mistaken as I hope to show. Mr. Finlay, on the other hand, does me the honour of suggesting, and I hope correctly, that I am somewhat in advance of the main current in arguing that our system of compulsory third party insurance by means of private insurers is still a long way from perfection,

¹⁷ *Hutchinson v. York, Newcastle & Berwick Railway Company* (1850), 5 Ex. 343, 353 *per* Alderson, B. See also *Tunney v. Midland Railway Company*, [1866] L.R. 1 C.P. 291.

¹⁸ *Wilsons & Clyde Coal Company v. English*, [1938] A.C. 57, 80 *per* Lord Wright.

¹⁹ Lord Wright in 6 *Camb. L.J.* 317.

and he is good enough to offer to supplement my observations by his learned adumbration of the system in operation in New Zealand.

The main object of my original article under this title was to trace the progressive improvement in the position of injured third parties wrought by the system of compulsory insurance embodied in the Road Traffic Acts, 1930-1934. It was found that this progressive improvement had been achieved at the joint expense of motorists and insurers, and it was questioned whether some of the changes were quite in accord with legal principle and whether, as a consequence, the quality of justice was not becoming a little strained. Nowhere was it suggested that the social experiment embodied in the compulsory insurance legislation was unethical or misconceived.

The questions of principle involved are, as I am glad to note that Professor Chorley agrees, particularly well raised by the series of statutes relating to compulsory third party insurance. I submit, however, contrary to what Professor Chorley suggests, that so far from my argument being one "against the general stream of social legislation," it is a criticism of it which is essentially constructive; it is a plea that, conditions being as they are, this powerful current should be directed and controlled along the most beneficial channels. To drop the metaphor, it is because I see in the existing and projected law governing this question inherent possibilities of harm and injustice and of development in wrong directions that I wrote the article. The discussion of them may be useful and Professor Chorley's valuable criticism of my article may make it more so.

At the outset I must point out that Professor Chorley in his criticism makes several statements which open up a wider field of discussion than did my original article. He begins by expressing doubt as to whether the compulsory insurance system has created for insurers or motorists any effective burdens at all; he ends by stating unequivocally that "undue tenderness" has been displayed towards insurance companies owing to what he suggests is their powerful financial antagonism to the new social measures; and in between, he argues that the Law of Contract unlike the Law of Tort is an inelastic thing "largely invented to serve the purposes of a particular economic era," and therefore in need of radical adjustment if modern social needs are to be met. This is, I submit with respect, irrelevant to my argument which did not pretend to deal with political or sociological considerations; it took our "particular economic era" as it is in order to discuss certain developments in our insurance system from a legal viewpoint; and, indeed, pointed out that "as a social experiment, this matter could be put in a quite different way from another angle." This is what Professor Chorley seeks to do, and he points out that "the conditions of modern society have long passed beyond the stage where the relationships which it entails can be satisfactorily adjusted on the basis of the Common Law alone." To this I have no objection, but I do object when Professor Chorley goes on to suggest that my criticism, which was I think constructive, is to be classed with "strictures such as . . . are met with on almost all occasions when innovations in the legal system are made," e.g. "The violent attacks which were made upon the Trade Union Act of 1870, the Workmen's Compensation Act of 1906, and the Trade Disputes Act of 1906." There is nothing whatever in my article to justify this.

Professor Chorley says that he challenges my attitude upon "a much wider ground," and his challenge seems to be that I did not discuss the

influence of the "particular economic era" and the "requirements of *laissez-faire* economics" upon the Law of Contract which "seems to be unamenable to the necessary process of adaptation." This I agree I did not attempt to do. That would be quite another day's work.

There is another aspect of Professor Chorley's critical article which cannot fail to have valuable results. While he does not take up, in order to refute or disagree with the points which I actually made, he advances certain other propositions which, stated with his weight of authority, indicate the importance of a clarifying discussion of them. They cannot, I regret to say, be accepted in the bald form he adopts without considerable reservation.

The first point, namely, that no effective burden has been created for insurers and motorists is, as anyone closely connected with the insurance world well knows, completely unsound. What, then, leads Professor Chorley to this conclusion? He says at the outset that the rights conferred by the Acts upon injured third parties are "somewhat limited" in extent. Since any right which is to be subject to any moral or legal restriction whatever must be "somewhat limited" in extent, this is not an argument at all. Next he says that the Act "cuts down in some degree the complete freedom of contract which insurers have so far enjoyed." Quite apart from the fact that under English standards insurers are not the only persons who enjoy complete freedom of contract, it is relevant to ask to what degree this cutting down process has gone.

Without reiterating the facts of my earlier article unnecessarily the position may be stated thus. If the third party is entitled to damages and the wrongdoer has an insurance policy, he will get his damages by direct right from the insurer, provided the general basis of the policy covers the circumstances of the injury. No matter if the policy is avoidable; no matter if the insured has broken contractual obligations into which he freely entered; no matter if the insurers have been tricked and defrauded; the third party will get his damages. That is the position in fact. In law, it is true, certain safeguards are preserved for insurers; but no practical discussion of the issues at stake can rest on theoretical grounds, and theoretical for the most part those safeguards certainly are.

To the undoubted financial burden of these provisions—which will be extended considerably if the recommendations of the Compulsory Insurance Committee pass into law—must be added that of the provisions regarding hospital charges and fees for emergency treatment. By them, insurers who have made a payment, whether under their policy or not, or whether they are liable for it or not, in respect of bodily injury arising out of the use of a motor vehicle on a road, become instantly liable to pay the hospital fees of any person injured in the same event, up to fifty pounds for each person, and to indemnify the vehicle driver against fees for "emergency treatment" whether he was liable for the injury or not.

There is yet another element of cost which must be added to the burden of compulsory insurance. It cannot be proved specifically or supported by chapter and verse. Yet in many respects it is most important of all in the practical field. It is the ever-rising level of damages for personal injury, the ever-growing "damage consciousness" of the general public, and the ever-tightening control of motor traffic on the roads. All of these forces have been concomitant with the development of compulsory insurance. They spring from the same viewpoint, and have their origin in the same idea. Consequently it is not unreasonable to say that these heavy

additions to the financial burden of motoring are directly associated with the certainty that every motorist is backed by an insurance policy. Although this point was alluded to in my original article, no comment is made on it by Professor Chorley. Perhaps he is aware, as I am, of the enormous difficulty experienced by insurers in defensive negotiation in claims by injured third parties owing to these factors.

The cumulative effect of all these, however, appears not to weigh heavily upon Professor Chorley. They are, he says—

“ . . . at most a superficial burden because the financial obligations of the insurers are nicely calculated in accordance with their premium incomes, and if the obligations placed upon them by Parliament are found to be too onerous there can be no question that the insurance companies will quickly make provision to meet them by a general increase of premiums.”

Such reasoning does not indicate a close acquaintance with the facts of the case. Does Professor Chorley know that the motor insurance rating system is anything but “nicely calculated”? Does he know that insurers are not making profits out of home motor insurance? Does he know that intense competition by one hundred insurance companies and Lloyd’s prohibits any general increase of premiums until years of loss have been traversed? Is he familiar, for instance, with the position in Eire, where, after years and years of unprofitable business wholly inadequate premium increases have at last been made? And does he know that the necessity of maintaining their position and of absorbing their overhead charges disenables insurers from refusing to underwrite business which turns unprofitable?

But Professor Chorley goes further than this. He says—

“In actual fact, however, by making third party insurance compulsory Parliament has presented to the insurers a substantial volume of new business, and this may well explain the comparatively small adjustment in regard to premium charges which followed the introduction of the legislation under discussion.”

How this can be reconciled with his later statement that before 1930 ninety-nine out of every hundred motorists were already insured it is difficult to see. But the fact is, of course, that the 1930 Act brought into the insurance market a vast quantity of inferior business which was previously uninsured or uninsurable and which, had they not been requested to the contrary by the Minister of Transport, insurers would have been only too glad to reject. The main reasons why larger increases of premiums have not taken place are, therefore, the force of competition, the desire to await the settling down of a new and complex situation, and above all the insurance companies’ extreme sensitiveness to public criticism.

This, however, is by the way. I take up the point because in present conditions it would be so palpably unjust to the insurance companies to leave it unanswered. So, too, is Professor Chorley’s closing inference that the partial failure of compulsory insurance—which is still not eight years old—is due to the “undue tenderness” with which insurance companies have been treated owing to the powerful financial interests which they were able to call to support their antagonism to the new social legislation. The attitude of the insurance companies has been consistently helpful within the limits to which the private organisation of their business will

permit them to go, and the Compulsory Insurance Committee, whose Report will, if adopted, impose further considerable burdens upon insurers, contained the names of several persons eminent in the insurance world.

Perhaps this gives rise to the crucial point of difficulty so clearly put in the editorial comment in *Halsbury's Statutes* on Section 10 of the Road Traffic Act, 1934: "So long as insurance policies are effected with private insurers and there is no State indemnity to third parties such provisions are no doubt inevitable." Many insurers think that they have gone to, if not beyond, the limits to which they can go, in surrendering the principles upon which their business is built. On the one hand, there is a vast and increasing problem of ensuring that large numbers of persons injured on the roads by motor traffic shall not be deprived of their just damages owing to financial factors alone. Quite obviously the logical conclusion of this principle is that no motor vehicle driver shall be capable of driving uncovered by insurance. If this is admitted, then obviously too, in spite of legal penalties for non-compliance, means must be found to fill in the gaps left by human error and deceit. It is at this point, on the other hand, that incompatible factors intervene. The situation seems to demand that uninsured persons must be deemed to be insured; that the insurer's policy must cover all and every vehicle, risk and circumstance; that the insurers' right to expect good faith in disclosure of vital facts shall disappear along with every other contractual safeguard which they would and should normally have. Such an enormous change from accepted principles would, to put it quite objectively, undermine and eventually destroy the bases upon which insurers at present seek to gauge their risks and calculate premiums. Consequently, acceptance of the principle in its ultimate degree, namely, that every time a motorist is at fault in injuring another person, insurance protection would automatically be available, would quite definitely destroy the fundamentals of the existing insurance system. In addition to an aggregate increase of premium charges, all pretence of making the premium commensurate with the risk would fall away, and numerous individual hardships would result.

If, in the final outcome, this eventuality is thought to be desirable, then the question will arise of insurance through a State office, as in New Zealand, according to the admirable summary of the law in force there which appeared at page 38 of your June issue from the pen of Mr. Finlay. But until that time arrives it will be for the Legislature to provide for the administration of a very difficult state of affairs in the fairest way available, having regard to the claims of the injured and the present invidious position of the insurers. Nobody conversant with the facts of the case will deny that the insurers have so far administered what really amounts to a great public service run for private profit with marked success considering the limitations and difficulties involved. With this conclusion I imagine that Professor Chorley will agree.

This, however, does not determine the focal point of this discussion, which is, What are to be the legal developments which will lead to a complete solution of the problem of third party insurance? So far as this discussion is concerned there are three views under consideration.

First, the criticisms in my original article were criticisms made on a purely legal basis of the system which we now have and which, being only eight years in operation, may still be considered to be in an experimental stage.

Secondly, Mr. Finlay has pointed out with learning and reason that the

system of private insurance without Government aid evolved in New Zealand has reached a high degree of efficiency and success.

Thirdly, Professor Chorley desires apparently to point to the principle of the Workmen's Compensation Acts as one which might be adapted to the problem under consideration.

It would take far more than the space available to me here if I were to extend my criticism of defects in the present legal system and to follow Professor Chorley into the field of political and sociological speculation. This, however, may be said of his suggestion. Its adoption would presumably involve the application of two features which characterise Workmen's Compensation cases, namely, the automatic right to compensation and a defined limit to compensation. It has not been shown how these could be satisfactorily applied to running down cases. To so apply them would probably have a far reaching and profound effect upon premium rates. The Workmen's Compensation Acts, originally denounced by employers, but now universally recognised as a real benefit to industry, provide no parallel to running down cases beyond a superficial one. Nobody has yet propounded a satisfactory scheme under which every injury inflicted by a motor vehicle should carry with it an automatic right to compensation, though some have gone far in this direction; nor has much support been given to proposals to limit the amount of damages in a running down case. Workmen's Compensation affords a fair, cheap and expeditious means of provision against vocational injuries which are one of the normal incidents of industry. By insurance these risks are translated from the field of interest to the field of costs. The application of this principle to running down cases would, it seems to me, so far extend the field of risk in this class of insurance business as to have amongst other effects that which I have indicated.

HECTOR HUGHES.

STATUTES

The Coal Act, 1938

Although this Act covers a very technical and specialist branch of Law, it is unusually interesting to the general lawyer in many ways. Perhaps it is most interesting as a striking illustration of the defects in the present Parliamentary procedure. It is in substance a socialist measure passed unwillingly by a conservative Parliament. The Bill was more amended in Parliament than any other measure in recent times and this is painfully clear when one considers in detail the various sections. The whole Act suffers from an obvious conflict in the minds of its makers. A section gives a power which is immediately cut down to the bone by a host of provisos.

The statute begins with an Act of Creation after the style of the first Chapter of Genesis; "there shall be a coal commission." This Coal Commission is a statutory Corporation aggregate and consists of a Chairman and four other members appointed by the Board of Trade. Only two members need have had any practical experience in the Coal Mining Industry. It is interesting to note that the Commission must give effect to directions from the Board of Trade on all matters of "national interest," and so is directly under the control of the Government of the day.

On the "Vesting Date," i.e. July 1st, 1942, the fee simple interest in all unworked coal and mines of coal vests automatically in the Coal Commission and the function of the Commission is to manage and deal with the coal with the object of promoting "the interests efficiency and better organisation of the Coal Mining Industry." Immediately following this comprehensive provision there follows a sub-section which seems to cut the powers of the Commission from under its feet. The Commission is expressly prohibited from "engaging in the business of coal mining or carrying on any operations for coal mining purposes." The Commission is accordingly in the desirable position of owning all the coal but being prohibited from itself dealing with its own property.

A minute's thought will show the obvious technical difficulties of separating the ownership of coal and mines, i.e. shafts and underground workings, from the ownership of the land itself. The Act solves these difficulties by giving the Commission no rights of ownership over anything but the bare coal and mines and only such easements (if any) over the surface as already exist in regard to each particular holding. It is a curious omission in the Act that it does not state what rights (if any) the Commission have to enter on the surface of land to sink a new shaft to enable a new seam to be worked. A right to withdraw support is given rather grudgingly on paying full compensation for damage caused.

Section 15 of the Act is a good example of the muddle caused by amendments inconsistent with the intention of the Act. In this section the Commission is given power to make new *underground* workings to get at the coal, but there follow the inevitable provisos that the Commission may not "(a) interfere with the surface of any land, (b) do any act which would be actionable by virtue of any servitude or restriction affecting the land, and (c) do any other Act which would be actionable as a trespass and which, if done, would be likely to cause actual damage other than of a purely nominal amount." There is accordingly no right to get the coal by new workings if the surface owner is in any way affected. It might be

mentioned that the Act contains no definition of what is meant by the word "surface" although this word is constantly used and of the greatest importance.

The provisions in regard to compensation are ingenious and apply the principle "set dog to fight dog." They may form a useful precedent for future legislation of the same sort and so are worth considering in detail. The Act fixes a "global sum" of £66,450,000 which *prima facie* comprises the whole compensation payable to the present coal owners. But in fact it is not an inclusive figure at all because the Act separates "principal coal hereditaments" from "subsidiary coal hereditaments." The principal coal hereditaments consist of the coal and mines and "the subsidiary coal hereditaments" are chiefly the "surface servitudes," i.e. the easements, etc. "adversely affecting the surface of any land (except the right to withdraw support)." The Commission has to pay compensation separately for "surface servitudes" in addition to the "global sum." The "global sum" is allocated to various regions; such as, say the Yorkshire Coalfield, by the Central Valuation Board. The coal owners in each region claim proportionately according to the value of their holdings against the sum allocated to their particular region. For this purpose the owners have to value their holdings. The provisions in regard to valuation owing again to amendments to the Bill, are somewhat startling. The basis of valuation is "the amount which the holding might have been expected to realise if this Act had not been passed and the holding had been sold on the valuation date (1st January, 1939) in the open market by the existing owners selling as willing vendors to a willing purchaser under a contract providing for completion on the vesting date (1st July, 1942)." The difficulty of fixing a purchase price on the supposition that three and a half years elapse between the contract and the date of completion can only be imagined and it must also be remembered that the unfortunate valuer has to value the easements to get the coal separately from the coal itself. Where, for example, a freeholder owns the coal under a large area and the colliery buildings' shafts and workings, only the coal, the shafts and underground workings vest in the Commission with any easements over the surface which already exist and the freeholder continues to own the colliery buildings and the whole of the surface, and when the whole property is all comprised in one lease, the rent has to be apportioned. The Commission will own nothing above ground at all, and so will be quite powerless to work the coal even if it were allowed to do so. The position of the colliery company who leases its coal is not directly affected by the Act so long as no sub-lease has been granted.

No compensation can be allowed unless the holding is registered with the Commission by 1st July, 1939, and a claim lodged by that date. If the owner of land is unaware of coal under it, he simply loses the coal without compensation as no claim will arise when the seam is discovered.

The financial position of the Commission is likely to prove more satisfactory than that of any other statutory corporation as it acquires income on a $6\frac{3}{4}$ per cent basis and should be able to borrow to pay the compensation in cash at $3\frac{1}{2}$ per cent, so a certain profit of 3 per cent on its capital should be made. This profit is to be used to create a sinking fund with the ultimate object of reducing the royalties payable by the colliery companies.

The Act also contains provisions in regard to the compulsory amalgamation of colliery companies which are chiefly remarkable for the amazing

"safeguards" which make it inconceivable that any compulsory amalgamation scheme could become effective if there is any genuine opposition.

It will be interesting to see how long it will be before a comprehensive amending Act is required in order to give the Commission adequate powers to carry out its functions under the Act. The Act is full of inconsistencies and ambiguities and it is a great pity that it is not possible to make an effective protest against legislation as unsatisfactory from the legal point of view as the Coal Act, 1938. Unfortunately this statute is not by any means unique in its defects.

J. H. A. LANG.

The Evidence Act, 1938

The Evidence Act, which has recently passed into law as a result of the efforts of the present Lord Chancellor, represents a fundamental change in the attitude of the law to documentary evidence. Hitherto the law has preferred to see witnesses rather than documents, with the unfortunate consequence in many cases that cogent evidence could not be considered at all. The Act is intended to remedy the defects of this principle. Whether the reason was the ritualistic potency of the oath, the discredited Best Evidence rule, or merely the practical policy of rejecting evidence involving a further potential inaccuracy, the Law of Evidence prior to 1st September, 1938, treated as inadmissible, to prove the truth of the facts stated, oral or written statements made by a person not called as a witness. Even if a witness swore that he recorded the statement at the time when it was made and that from his own knowledge it was a true account, the statement was inadmissible although he was allowed to refer to it for the purpose of refreshing his memory. There were certain well-defined exceptions: statements in public documents, admissions and confessions, and statements made in certain circumstances by persons since deceased. These cases have not been affected by the Act, although it will often be simpler now to introduce statements formerly admissible only in these exceptional circumstances. The Act provides, however, that the present law as to declarations relating to pedigree is not to be extended.

S. 1 (1) declares that in *civil* proceedings where direct oral evidence of a fact would be admissible any statement made by a person in a document tending to establish that fact shall, on production of the document, be admissible as evidence of that fact. A statement in a document shall be deemed to have been made by a person where it was "written made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible." The conditions for the reception of such statements are, where the maker of the statement is called as a witness: (a) personal knowledge on his part of the matters dealt with by the statement; or (b) that the document in question is part of a continuous record made, in so far as the matters dealt with are not within his personal knowledge, in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters. No attempt is made to define "duty" or "record." The interpretation of these terms is left to future litigation, to which there are further invitations in the failure to define certain other conceptions employed by the Act. It should be noted that, since there are no requirements of the contemporaneity of the record or the personal

knowledge of the recorder, this section will admit as evidence documents which hitherto have not been available even for the purpose of refreshing memory. S. 1 (4) requires that there should be some written evidence that the statement in the document was either made by the person by whom it is alleged to have been made, or that he is responsible for its accuracy, and for this purpose the Court may draw any reasonable inference from the form or contents of the document or other circumstances.

By a proviso to s. 1 (1) the condition that the maker of the statement must be called as a witness *must* be dispensed with where (i) he is dead; or (ii) he is by reason of illness unfit to attend; or (iii) is beyond the seas, and it is not reasonably practicable to secure his attendance; or (iv) all reasonable efforts to find him have failed. In addition, it is enacted that the Court *may* dispense with the presence of a witness "if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused." The Court may by order or at the trial admit certified copies of original documents or parts thereof, and power is given to amend the R.S.C. so that the attendance of witnesses may be dispensed with notwithstanding that a party desires their attendance for cross-examination.

The above provisions create two considerable dangers: (a) a jury may attach undue importance to documents admissible under the Act; (b) evidence may be manufactured. To meet these abuses, two safeguards are introduced: (a) the Court may, where proceedings are with a jury, reject statements otherwise admissible where it appears inexpedient or unjust to admit them; (b) nothing in s. 1 is to render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which that statement might tend to establish. This "*ante litem motam*" qualification is already a familiar one in the law of evidence, but it should be remarked that a statement made *post litem motam* is not excluded unless made by a person interested. What amounts to "interest" for this purpose is not stated.

An unusual and perhaps a unique feature of the Act is that it contains a provision as to the weight to be attached to the evidence it renders admissible, although the directions are no more than common-sense guides. S. 2 (1) says that in estimating the weight, if any, to be attached to statements regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to questions of contemporaneity and of incentive to concealment or misrepresentation. By subs. 2 where by law or practice corroboration is required, statements admissible under the Act are not to be considered corroborative of evidence given by the maker.

S. 3 introduces an important development in the law relating to proof of the attestation of documents. In both *civil and criminal* proceedings instruments, other than testamentary documents, for the validity of which attestation is required may be proved in the manner appropriate where no attesting witness is alive. This abrogates the rule by which, subject to a few exceptions, attestation could be proved only by calling an attesting witness. By s. 4 in *civil and criminal* proceedings, those presumptions which attached to documents thirty years old now apply to documents only twenty years old.

A useful commentary on the Act has been produced by Messrs. Burrows & Cahn (Sweet & Maxwell; pp. 55, price 3s. 6d.). It can be recommended as an excellent explanation of the Act and those problems

which already appear to be raised by its provisions. There is a prefatory note by Lord Maughan.

J. GOLD.

The Criminal Justice Bill¹

The principal contents of the Bill can be summed up *under two headings*—

(I) the *abolition of degrading and useless penal methods* and of *degrading denominations*;

(II) the *building up of new methods* of treatment and the *further extension of existing methods* which have already proved their value.

I. The proposals for the abolition of *corporal punishment* (clauses 32 and 47) follow closely the recommendations of the Report of 1938,² whilst the corresponding step as to *penal servitude* (clause 33) is based upon the recommendations of the Report on Persistent Offenders of 1932. The term "*Hard labour*" has for a long time already lost any meaning, except among the uninitiated part of the general public, and the failure of the *Division System* to serve as a means of scientific classification of prisoners has become undisputed. It is therefore only right that the Bill proposes the abolition of both (clause 33). Also under this heading falls the replacement of the expressions "*criminal lunatic*," and "*Criminal Lunatic Asylum*," which are contradictory terms, by the more dignified phrases "*state mental patient*" and "*State Mental Asylum*" (clause 33).

Prison sentences in the case of *adolescent offenders* are to be avoided as far as possible. Clause 27 contains a carefully graded system of restrictions, varying from an absolute prohibition in the case of persons under 16 and a somewhat less categorical one for those under 17 to a compromise solution for the age groups 17 to 21, opening up, however, even for the latter the future prospect of complete exemption from prison.

II. Those parts of the Bill devoted not to the removal of old remnants, but to the extension of modern methods, may be discussed under three headings—

(1) *New developments in the institutional treatment of lawbreakers*:

(a) The changes concerning the *Borstal sentence* (clause 31) belong to the most controversial parts of the Bill. The present requirements (previous conviction or breach of a condition of a probation order, criminal tendencies, etc.) are to be replaced by the formula that the court must be satisfied "that by reason of the offender's character or habits it is expedient with a view to his reformation and the prevention of crime that he should undergo a period of discipline in a Borstal institution." Moreover, the Bill proposes to give Courts of Summary Jurisdiction power to commit to Borstal, but this proposal seems now to have been dropped before the committee stage.

(b) Of great interest are the clauses introducing new semi-institutional methods—

Howard Houses and *Compulsory Attendance Centres*. They are intended to fill the existing gap between probation and fines, on the one hand, and prison and Borstal, on the other. Their scope is at present restricted to young people, but it may be hoped that, if the

¹ Limited space prevents anything but a brief summary of the main contents of the Bill.

² See the June, 1938, issue of this Journal.

new methods prove successful, they will be gradually extended. Howard Houses (clauses 13 and 29) will be hostels for offenders between 16 and 21 who "do not require Borstal training but ought to be sent away for a time from their homes," etc. Compulsory Attendance Centres are for young offenders of similar age groups guilty of minor offences and who are at present being dealt with by such unconstructive methods as short terms of imprisonment or fines.

A third form of semi-institutional treatment, almost a dead letter in the present law, is to be revived by means of a comprehensive and carefully balanced set of new regulations: *Detention* in precincts of a court or at a police station (clause 40).

(c) The great need for developing the remand home to something more than a mere waiting room has led to several propositions: There will be established *Remand Centres* for adolescents between 14 and 23 (clauses 10 and 28) and *State Remand Homes* for persons under 17 on whose mental condition a medical report appears desirable (clause 11).

(d) One of the most difficult parts of the Bill will undoubtedly be that dealing with *corrective training* and *preventive detention* (clauses 16 and 34), based upon the recommendations of the Report on Persistent Offenders, 1932.

Terms of 2 and 4 years corrective training are to be given to certain recidivists between 21 and 30 years who at present, being too young for preventive detention, may be sent to special prisons, such as Chelmsford, etc. For the more dangerous recidivists of at least 30 years of age the sentence may be preventive detention of 2 to 4 years or, in very serious cases, up to 10 years. The present requirement that the offender must be a "habitual criminal" is dropped, and the list of offences which fall under the scope of this provision is extended beyond that given in the Prevention of Crime Act, 1908. On the other hand, whilst the Act of 1908 speaks only of "protection of the public," reformation is now expressly recognised as one of the main purposes even of preventive detention.

(2) *Extension of non-institutional methods—*

(a) *Probation*: The whole procedure for making a probation order will be simplified by dispensing with the need for a formal recognizance (clause 18), whilst—another point which has aroused much opposition—the present power of Courts of Summary Jurisdiction to make a probation order without a conviction is to be abolished. The period during which a probationer may be required to reside in an institution is to be limited to 12 months. Special case committees shall be set up to supervise and assist the work of the probation officers in individual cases.

(b) *Mental Cases*: One of the most conspicuous features of the Bill is the special consideration it gives to the treatment of mental cases, not only in connection with institutional methods, but also for offenders at large: An offender remanded on bail may be required to undergo medical examination (clause 38), and a probation order may include a provision requiring the probationer to submit to mental treatment as a resident or an out-patient (clause 19), etc.

(3) *Changes in the system of discharge on licence, of remission and of prison administration:*

The abolition of penal servitude and the establishment of new types of

institutional treatment render necessary an overhauling of the present system of remission, of supervision after discharge, etc., which is to be found in clauses 35 and 52 *et seq.* Moreover, the offices of Prison Commissioners and of Directors of Convict Prisons are to be abolished, and the functions of the former will be transferred to the Secretary of State (clauses 43 *et seq.*).

HERMANN MANNHEIM.

Administration of Justice (Miscellaneous Provisions) Act, 1938

Changes of far-reaching importance and of great significance are brought about by the Administration of Justice (Miscellaneous Provisions) Act, 1938. The reforms are a rather ill-assorted miscellany to find in a single Act. They range over Quarter Sessions, the Crown side of the King's Bench Division, Assizes, County Courts, and International Conventions, amongst other subjects.

1. Quarter Sessions

SS. 1 to 4 make provision for the appointment of a legally qualified chairman or deputy-chairman in some circumstances. That fact is sufficient to constitute the Act a landmark in the history of English judicial institutions. The magisterial Bench may at long last have to surrender some part of its amateur status; the surrender, however, is compensated for by some extensions of jurisdiction.

The Court of Quarter Sessions for any county, or of any division or part of any county having a separate court of quarter sessions (not being the court of the recorder of a borough) may apply to the Lord Chancellor for the appointment of a legally qualified chairman or deputy chairman (s. 1). The person so appointed must be, or have been, a barrister or solicitor of not less than ten years' standing, having such legal experience as may in the opinion of the Lord Chancellor qualify him for the post (S. 1 (1).) Tenure of office depends upon the terms of the appointment and the holder becomes a justice of the peace *ex officio* (s. 1 (3)). The prescribed qualifications are interesting. The law for the first time recognises the profession of solicitor as qualifying a person for magisterial or judicial office. Furthermore, ten years' standing is a condition of qualification as compared with five years for a Recorder, five or seven years for a stipendiary magistrate, and seven years for a County Court judge. The local character of the office of justice of the peace is preserved in a modified form, it being expressly provided that the Lord Chancellor in considering an appointment shall take into account the expediency of recommending a person residing in or connected with the county (s. 1 (1)). If the Court of Quarter Sessions and the County Council so agree, a salary may be paid by the county council to a chairman or deputy-chairman appointed under the Act at an agreed rate to be approved by the Lord Chancellor (s. 4 (1)). Where a court of Quarter Sessions is presided over by a "legally qualified chairman" the jurisdiction of the court is extended to the offences set out in the First Schedule to the Act (s. 2 (1)). *Inter alia* the extended jurisdiction embraces offences under the Malicious Damage Act, 1861, s. 60, Criminal Law Amendment Act, 1885, s. 11, Perjury Act, 1911, ss. 2-6, Forgery Act, 1913, s. 2 (a), Criminal Justice Act, 1925, s. 36, etc. The expression "legally qualified chairman" includes (1) a chairman or deputy-chairman appointed under the Act; (2) an elected chairman who holds or has held certain judicial

offices, e.g. member of the Judicial Committee of the Privy Council, judge of the Supreme Court, an official referee attached to that court, judge of a county court, Attorney or Solicitor-General, Director of Public Prosecutions, recorder of any borough having a separate court of quarter sessions and a population of not less than fifty thousand, and others (s. 2 (2) and (3)).

The importance of this part of the Act is obvious. It represents the first statutory recognition of and attempt to remedy defects in the system of amateur tribunals. It is doubtful how far the statute will be acted upon. It is in terms permissive only and it is doubtful whether county councils will be very anxious to incur the financial obligation of paying a chairman's salary. It is more probable that their efforts will be directed to ensuring that the Bench shall include a qualified lawyer, willing to act as chairman if elected to that office by his fellow magistrates. This opinion is fortified by reflection on the sparing use which has been made by boroughs of the power to appoint stipendiary magistrates. The Act, in any case, should be only the prelude to a thorough overhaul of the system of amateur tribunals. The participation of laymen in the administration of justice can be bought too dear, as can the resulting economy to the State. The Grand Jury was long endured on the strength of the former argument, and the Lord Chief Justice has recently and surprisingly lamented its passing from this point of view. Further changes will come and the ultimate development may well be the extension all over the country of stipendiary magistrates exercising summary jurisdiction and Recorders, sitting with a jury, exercising the jurisdiction of Quarter Sessions.

2. *Proceedings on the Crown Side of the King's Bench Division.*

The prerogative writs have never played a more important role in the English legal and social system than they do to-day. Their importance lies in the fact that they provide means of questioning the legality, but not the discretion, of judicial or quasi-judicial acts of public bodies, including Government Departments, as well as of courts of justice other than the High Court. The Act abolishes the prerogative writs of mandamus, prohibition and certiorari, and substitutes orders with corresponding titles (s. 7). It is further provided that there shall be no return to any such order, nor any pleadings in prohibition (s. 7 (4)). The order is final subject to any right of appeal therefrom. Thus orders or rules *nisi*, and summonses to show cause are abolished. The Act has been supplemented by the Rules of the Supreme Court (Divisional Courts), 1938, No. 1577/L. 30, revoking the Crown Office Rules, 1906. No application for an order may be made without leave, which is obtained by application to a divisional court of the King's Bench Division, or to a judge in chambers during vacation. The application for the order is by notice of motion to a Divisional Court or by summons to a judge in chambers during vacation. Any powers vested in the High Court to require justices of the peace or a judge or officer of the county court to do any act relating to the duties of their offices, or to require any court of summary jurisdiction or court of quarter sessions to state a case, are now exercisable by order of mandamus (s. 8). Informations in the nature of *quo warranto* are abolished and the Court is given power instead to issue injunctions in any case where an information would have lain and also (if the case so requires) to declare an office to be vacant (s. 9).

S. 11 provides a new code governing the original criminal jurisdiction of the High Court. The power to order a trial at bar in the King's Bench Division is retained, though the High Court may direct instead that the

indictment or inquisition be tried in the Central Criminal Court before three judges of the King's Bench Division. Any indictment found in accordance with s. 1 (4) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, by a grand jury of the County of London and of the County of Middlesex, is to be tried in the King's Bench Division unless the High Court orders otherwise, and it may order that it shall be tried at the Central Criminal Court. S. 11 (3) gives further supervisory criminal powers to the High Court. Whenever it appears expedient in the interests of justice the court may transfer an indictment for trial in another court of assize or court of quarter sessions than the court in which it would have been tried but for the direction.

S. 12 sweeps away some legal deadwood by abolishing outlawry proceedings, the exhibiting of articles of the peace in the High Court, and criminal informations other than informations filed *ex officio* by the Attorney-General.

3. County Courts.

The County Courts Act, 1934, ss. 40 and 41 limit the jurisdiction of county courts in actions of contract or tort or for money recoverable by statute to claims not exceeding £100 in amount. The Act of 1938 increases that amount to £200, but if the amount claimed exceeds £100 the judge, on being given notice by the defendant that he objects to the action being tried in the county court, must order the action be transferred to the High Court (s. 16). S. 54 of the County Courts Act, 1934, empowers the High Court on application to transfer equity proceedings to the county court. That power is now, by virtue of s. 17 of the Act of 1938, exercisable without application. S. 18 extends the jurisdiction of county court registrars. Orders may be made under County Courts Act, 1934, s. 99, authorising the registrar to hear and determine any proceedings other than actions, and any actions in which the defendant fails to appear at the hearing or admits the claim, and on the application of the parties by leave of the judge, any actions in which the sum claimed or the amount involved does not exceed ten pounds.

4. Miscellaneous.

S. 13 deals with international conventions affecting the jurisdiction of English courts. As from the day when the convention comes into force as respects England, every High Contracting Party is, for the purposes of any proceedings brought in the Supreme Court against or in respect of property of that party in accordance with the provisions of the Convention, deemed to have submitted to the jurisdiction of the Court.

S. 14 gives the High Court a general power to discharge, vary, suspend, or revive any order for alimony or maintenance made under ss. 187, 190 (2), 190 (3), 190 (4), 191 (2), of the Judicature Act, 1925, or under any statute repealed by that Act.

S. 15 transfers all appeals from causes and proceedings in the Mayor's and City of London Court from the Divisional Court to the Court of Appeal. The appeal is to be governed by the rules regulating appeals from county courts, except in any proceeding in which the procedure of the High Court has been adopted, in accordance with s. 8 of the Mayor's and City of London Court Act, 1920, when the appeal is likewise regulated in the same way as an appeal from the High Court.

E. WYNDHAM WHITE.

NOTES OF CASES

Breach of Contract—Breach of Statutory Duty—Negligence

The case of *Read and another v. Croydon Corporation* (1938), 55 T.L.R. 212, raises issues of considerable legal and of transcendent public importance. It is rare for the circumstances giving rise to an action to have effects as far-reaching and, ultimately, as beneficial as in this case.

The action was a test case arising out of the serious water-borne typhoid epidemic in Croydon in November, 1937, caused by the unknowing introduction of a typhoid carrier into a Corporation well at a time when the chlorinating and filtering apparatus had been disconnected. When the case was heard, less than a year after the outbreak, the expert witnesses on both sides deposed to the fact that, *post hoc propter hoc*, water-engineering practice throughout the country had undergone a root-and-branch change. So much so that counsel for the defendants urged that the judge should avoid a possible temptation to test the Corporation's conduct by the standards prevailing after the epidemic. Nevertheless, Mr. Justice Stable had no hesitation in finding that the Corporation, according to current practice prior to the outbreak, had been negligent in the steps taken to supply water to the consumers, and it was upon this postulate that he considered the question of legal responsibility.

The plaintiffs in the action were a father and daughter of whom the daughter, who had contracted typhoid through drinking water supplied to her father's household, claimed general damages, and the father claimed the medical and other expenses to which he had been put by reason of the girl's illness.

The father based his claim upon five causes of action, viz.—

(1) Breach of contract for the sale of goods, with a warranty imported by s. 14 of the Sale of Goods Act, or alternatively;

(2) breach of contract for the rendering of services with a similar warranty (upon the authority of *G. H. Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46);

(3) breach of statutory duty;

(4) common law negligence;

(5) nuisance.

The daughter relied upon the last three only of these legal bases as she was not a ratepayer and had no contractual relationship with the undertaker. No point was made that, as was suggested by Lord Justice Slesser in his judgment in the case of *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650, the daughter might enjoy a contractual claim as being a person within the contemplation of the undertakers at the time when they agreed to furnish a supply of water and this novel doctrine still remains to be determined by the courts.

So far as the allegation of nuisance was concerned, this was abandoned by the plaintiffs at an early stage of the case and was never argued. It seems clear that the injury complained of was not sufficiently proximate to the enjoyment of the plaintiffs' land to permit success on this ground.

With regard to the father's claim in contract, his Lordship ruled that the plaintiff had failed to prove that there was a contract giving rise to warranty, either under the Sale of Goods Act or for services. The learned judge found that the corporation was under a statutory obligatio

contained in the Waterworks Clauses Act, 1847, to supply "pure and wholesome water sufficient for the domestic use of the inhabitants" and that a relationship "forced on two persons by Act of Parliament" was not contractual and, in consequence, the rights of both parties were confined to those prescribed by the statute. It is difficult to apprehend how (considering the matter on grounds independent of those assigned by the judge for his view of the law) the plaintiff could have set up the existence of a contract for the sale of goods. A contract which provided for an unlimited supply of water coupled with provision of pipes, reservoirs, constant service of Corporation employees and the other elements of a water undertaking seems plainly *sui generis*. While there can be little doubt that the judgment on this point is in accordance with the weight of authority, the designation of this type of legal relationship as a purely "parliamentary contract" establishes (in view of the construction placed by the judge upon the duty contained in the statute) a somewhat startling difference between the position of a person purchasing an article under the Sale of Goods Act and that of a person purchasing water under a general or local statute. Although the consequences of a default by a vendor in the latter case may be far more serious than in a case where conditions and warranties are implied, a purchaser has to prove negligence on the part of the water undertaker to sustain an action. This is particularly unsatisfactory because, in many cases, the vast ramifications of a waterworks might make it impossible for a plaintiff to "point a finger" at any particular matter alleged to have caused his injury and, if the decision in *Daniels v. White*, [1938] 4 All E.R. 258, is followed, the doctrine of *res ipsa loquitur* may furnish little assistance.

Dealing with the claim for breach of statutory duty, his Lordship held that the father alone came within the category of persons to whom any duty was owed under the Waterworks Clauses Act, 1847. With regard to his claim, the defendants contended first, on the authority of *Hammond v. The Vestry of St. Pancras*, L.R. 9 C.P. 316, that the duty was not absolute but was a duty to use all reasonable care and diligence to do what the statute enjoined and, secondly, that even if the duty, so qualified, had not been performed, the Act contained a penalty for the breach, which was the plaintiff's exclusive remedy under the statute and which, in addition, deprived him of any remedy at common law. The first of these defences ceased to have any importance in view of the findings of fact that, even if construed according to the defendants' interpretation, the duty had not been fulfilled. However, the judge ruled (in what must be regarded as an *obiter dictum*) that the defendants were correct in this contention and that, had he been unable to find evidence of negligence, the plaintiffs must have failed in their action. Upon the question of the exclusive character of the penalty clause, the judge declined to accept the defendants' argument and expressed the view that every Act of Parliament (and in some cases, including the present one, different sections of the same Act) must receive individual consideration to decide whether the penalty provisions were intended as the sole remedy and to consume any right of action at common law. "I find it impossible to hold, unless compelled by authority so to do, that the legislature intended there should be one remedy, and one remedy only, equally applicable to so trivial a breach as a failure to maintain a certain pressure of water behind a fire plug, to a deliberate dereliction of duty resulting in the destruction of a large community by the supply of poisonous water."

As a result, his Lordship held that both plaintiffs were entitled to succeed; the father on the grounds of breach of statutory duty and common law negligence and the daughter on the latter ground only.

A. GOODMAN.

Nokes v. Doncaster Amalgamated Collieries [1938] 4 All E.R. 6

Those optimists who believe that English law progresses on and on and up and up should be discomfited by the resemblance this case bears to the spirit of the Ordinance of Labourers. In 1349 press-gang methods for the conscription of labour were considered justifiable to meet the consequences of the calamity which had befallen the country in the previous year. Six hundred years later with an embarrassingly over-stocked labour market this form of coercion must, when practised, be in some interest narrower than the national.

In this case the respondents preferred a summons against the appellant under s. 4 of the Employers and Workmen Act, 1875, alleging that on a certain date he had wrongfully absented himself from, or neglected, the service of the respondents at their colliery. The justices ordered the appellant to pay a small sum of money by way of damages and costs for breach of his contract of service. The appellant had entered into this contract with the X Co. to serve them as a coalminer in the X colliery. The X Co. was dissolved under s. 153 of the Companies Act, 1929, and its property, rights and liabilities were transferred to the respondents by an order of the Chancery Division made under s. 154. Upon this transfer of the X Co.'s undertaking the respondent for a short period failed to appear for work at the X colliery. It was in respect of this absence that the respondents claimed damages. The appellant argued that there was no contract between him and the respondents, and that the order of the Court could not effect the transfer of the existing contract to them since it was for personal service and so not assignable. The King's Bench Division approved the decision of the justices and held that the contract was part of the property which was transferred under s. 154. This decision was not the inevitable consequence of the wording of that section. It might well have been held that assignment under the section was subject to the recognised limitations on assignability at law and in equity. It is interesting to note that the judgments speak of "statutory novation." This misrepresents the true nature of the decision in this case. The essence of novation is the agreement of all the parties concerned. Nobody pretended that the appellant had been consulted as to his willingness to work for the respondents. This was simply a case of assignment, and there can be no doubt that the contract gave rise to rights and duties of so personal a kind that, apart from the court's interpretation of the Companies Act, the contract would not have been assignable. No reference was made to the well established duties which are imposed by the law on employers. They must exercise reasonable care in the provision of safe plant and skilful fellow-workers, and must show a similar concern in the adoption of a safe system. A workman may be willing to work for one master whose reputation on the performance of these duties has never been impeached. He may be less willing to work for another who has shown less regard for the strict observance of these and other duties. It cannot be suggested that vicarious performance of these duties would be possible.

It is not inappropriate to point out that in the case of a transfer under

s. 154 a shareholder who objects to the transfer of the company's undertaking may insist on being bought out. The court will not sanction the transfer unless the dissenting shareholder is compensated. Once the transfer is sanctioned, however, the unwilling workman passes with the plant to the assignee like a fixture. The obvious moral for workmen is to work hard and become shareholders.

J. GOLD.

Road Traffic Act, 1934, s. 10

In *Cross v. British Oak Insurance Company Ltd.*, [1938] 2 K.B. 167, du Parcq, J., drew attention to the difficulties inherent in the modern method of legislation in the following passage of his judgment (p. 170): "the Act does not appear to deal with all the contingencies which may arise. Perhaps I should say that the Act seems to have been drafted, or at any rate finally passed, in a form which would lead one to suppose that those responsible for it had not envisaged some of the events which were not only likely but certain to happen, and were legislating either in ignorance or forgetfulness of the procedure in the courts of the country." The statute in question was the Road Traffic Act, 1934, and the procedure overlooked by Parliament was that of third party proceedings and counterclaims. It will be recollected that the statute in order to ensure that insurance companies shall have the opportunity to know about legal proceedings against the persons whom they have insured which may later result in their becoming directly liable to the claimant in such proceedings, makes it essential that the insurer shall have "notice of the bringing of the proceedings" "within seven days after the commencement of the proceedings" in question (s. 10 (1) (2)). The point at issue was how a counterclaim is to be dealt with for the purpose of this subsection.

What actually happened in the instant case was that a passenger, Baker, in a motor car driven by the plaintiff Cross was injured, as was Cross himself, in a collision with a car driven by one Fowler. Baker sued Fowler. Fowler blamed Cross and brought him into the proceedings by third party notice, of which the defendants who were Fowler's insurers had due notice. Cross thereupon blamed Fowler, and counterclaimed against him. No notice of the counterclaim was delivered to the defendants. In the result Fowler was found to be solely to blame for the accident, but the judgment given against him was never satisfied, and in the present proceedings Cross sued the insurers under the terms of s. 10 of the statute. It was held that as notice of the counterclaim had not been given the plaintiff failed.

It was contended that notice of the third party notice was notice of the proceedings and the learned judge would have been prepared to take a liberal view and accept this, but for the fact that s. 10 (3) which contains the well known provision enabling the insurer to take proceedings to have the policy avoided on grounds such as nondisclosure, etc., requires that such proceedings shall be commenced within three months after the commencement of the proceedings in which the judgment was given. As the counterclaim might not have been launched until three months after the third party notice the learned judge felt impelled to accept the view that the notice required was notice of the counterclaim. We thus reach the almost comic position that Baker can recover while Cross cannot, yet the information material to the one case, which the insurance company had, was all the information which was material to them in the other. It may be that the decision of the learned judge was over technical, but it is obvious

that the over-elaboration of the administrative requirements laid down in the statute is what caused the difficulty. Our legislation becomes worse and worse from this point of view. Would it be too much to ask for an experiment in the form of a statute enunciated in general terms, and in which the administrative details were left to be worked out by the courts in the light of the requirements which are discovered to be necessary in practice?

Windsor v. Chalcraft, [1938] 2 All E.R. 751, also throws valuable light on the same legislation. In this case the defendant motorist had allowed judgment to go by default. His insurers had been informed by the plaintiff of the issue of the writ, but the defendant himself never gave them any information as to what was taking place, and they apparently first became aware of what had happened when called upon to pay the amount of the judgment which the plaintiff had obtained. They thereupon applied to have the judgment set aside, on the ground that under the terms of the policy they had been entitled to take part in the defence of the action. Eventually they obtained an order to this effect by a majority decision of the Court of Appeal which allowed an appeal from *du Parcq, J.*, whose view was that the insurers had no *locus standi* to ask for the judgment to be set aside.

These facts very neatly bring out some of the legal difficulties involved in this legislation. In the majority of road accident cases insurance companies have been the real defendants for many years. The compulsory insurance provisions of the Road Traffic Acts, 1930 and 1934, have accentuated this position. Nevertheless, although as we have seen above they are now given certain statutory rights in connection with the litigation, insurers have to rely upon the terms of their contracts for any rights which they may have to take part in the conduct of the litigation in which they are so vitally interested. Before the statutes if the insured ignored the rights of the insurer under the policy the latter did not suffer because he could refuse to pay an indemnity. Now, however, the insurer becomes directly liable to a successful plaintiff, and ought to be allowed a voice in the litigation. The legislature has not faced up to this position. The majority of the Court of Appeal have very valiantly attempted to repair this omission. The difficulties in their way are best revealed in the judgment of Slessor, L.J., which displays the logical methods of adherents of the *status quo* to perfection. At Common Law he points out there is no sort of legal nexus between the injured plaintiff and the defendant's insurer upon which the latter could intervene to have a judgment set aside. Under the statute the whole of the liability of the insurer and the conditions under which it arises are regulated by the code thereby established, and this does not make him *litis particeps*. Therefore he has no status to ask for a judgment against the insured defendant to be set aside. The case of *Jacques v. Harrison* (1884), 12 Q.B.D. 165 which was much relied upon in argument was not really in point because the stranger in that case was a legally interested party being a mortgagee of leasehold property whose mortgagor had allowed judgment to go by default in an action for the recovery of the demised property by the owner of the reversion. The judgment of Bowen, L.J., however, enunciated a wider principle than the facts required, and on this the majority were able to base their decision.

MacKinnon, L.J., in the course of his judgment points out that a similar problem may arise in other forms of insurance. This brings us up against the important fact that the common law rules will have in a number of

directions to be administered in a supple and elastic manner with due regard for the realities of the situation if the vast, and very beneficial, extension of insurance into numerous walks of life is to be provided with an adequate and satisfactory legal foundation.

R. S. T. CHORLEY.

Unjust enrichment: *Re Cleadon Trust*

The judgment of the Court of Appeal in *Re Cleadon Trust* (55 T.L.R. 154) is of exceptional interest as a contribution to the present attitude of English Law towards the principle of unjust enrichment.

The plaintiff had a controlling interest in, and was one of the two directors of, a company which owned shares in, and all the debentures of, two subsidiary companies. The three companies had the same board and secretary. At various times, the plaintiff advanced considerable sums of money to pay builder's costs incurred by the subsidiary companies in building flats. The money was paid with the assent of the other director and the secretary. In view of the intimate relations between the three companies, it was not easy to say which of them technically received the money. The cheques were made out direct to the creditors of the subsidiary companies and handed by the plaintiff to the secretary who dealt with them. The principal company habitually paid debts of the subsidiaries, for which it was liable as a guarantor.

The principal company went into liquidation, and the plaintiff proved the amount of his advances against the liquidator who rejected the plaintiff's claim. There was no doubt that the plaintiff could not prove his claim in contract. According to the Articles of Association, two directors were necessary to form a quorum, and there was only one director, apart from the plaintiff who was an interested party and was therefore barred from making up the quorum which could sanction the loan. The question was whether there was any other ground on which the claim could be based.

Bennett, J., and the majority of the Court of Appeal, the Master of the Rolls dissenting, rejected the claim. The legal problems arise in the following order:

1. In *Sinclair v. Brougham*, [1914] A.C. 398, the House of Lords had rejected an attempt to recover in quasi-contract money borrowed by the defendant company *ultra vires*, since the fiction of a contract was not possible and the law could therefore not imply an obligation, but it helped the plaintiffs by extending the equitable principle of *Re Hallet's Estate* (13 Ch. D. 696) and, by a series of fictions, considering the depositor's money as trust property which could be followed through various metamorphoses. This principle could not apply since there was not, in this case, a fiduciary relationship.

2. In a number of cases, notably in *Bannatyne v. McIver*, [1906] 1 K.B. 103, *Liggett v. Barclays Bank*, [1928] 1 K.B. 48, it was held that where money is borrowed on behalf of a principal by an agent, whose act is not authorised or ratified by the principal, in equity the lender was entitled to stand in the same position as if the money had been borrowed by the principal, to the extent to which the money had in fact been applied in paying legal debts or discharging obligations of the principal.

Several difficulties were in the way of applying this principle to the present case. In dealing with them, Greene, M.R., dissented from Scott and Clauson, L.J.J. He held that this so called principle of subrogation could apply to the present case. Firstly, it was a matter of form, not of substance,

whether cheques were sent to the debtor or direct to the creditor. Secondly, it appeared that the advance was technically made to the subsidiaries, not to the principal company. But Greene M.R. disposed of that by holding that the discharge of debts incurred by the subsidiaries relieved the principal *pro tanto* of its guarantee and thus increased its assets. He did not think that the principle as applied in the above quoted cases was confined to cases where the borrower, although unauthorised for the particular act, had general authority to pay the company's debts. Were that otherwise, it might make a difference whether the money was handed over to a director (no authority) or to the cashier (authority). The learned Master of the Rolls then drew the analogy to the case of necessities furnished to a deserted wife. The ground for refund in all these cases was in equity, although it had never been clearly stated what principle was underlying this equity.

"It may be that it is a mere anomaly. Such anomalies are found at law in some cases of quasi contract. The fact is that our law did advance in certain respects some way towards recognising a doctrine of unjust enrichment, but the process was stopped short, leaving certain anomalies based on ancient authority embedded in law. It may be that this principle of equity is to be explained on the same ground. The principle, as I understand it, appears to me a beneficent one, and I should be sorry to see its application cut down in the manner suggested."

This line of thought the other two learned Lord Justices refused to follow. Scott, L.J., based his refusal to apply the equitable principle of subrogation to the present case on two grounds.

1. The company as a juristic person did not and could not act in the matter, could not legally accept money, since it was not properly constituted. He held, as did Clauson, L.J., that the company was in a state of legal paralysis, had no mind, whereas in the other cases someone had accepted money on behalf of the debtor who had authority to pay debts.

The equity could not arise from the fact of the benefit received, but from the fact that the debtor, by himself or by a person authorised to act for him, in the matter of paying debts, had used money so as to obtain a benefit for the debtor.

2. It is a rule of the Common Law that payments made voluntarily and without any legal liability or compulsion, in discharge of the debt or liability of another, raise no implied contract for repayment.

Scott, L.J., also observed that, if there was a general equitable principle akin to the continental doctrine of unjust enrichment, it was subject to principles of equity and might not apply in a case like the present where the plaintiff, having a controlling interest in the company, had flouted the provisions of a statute enacted for the protection of the plaintiff.

The Court of Appeal did not discuss *Craven-Ellis v. Cannons*, [1936] 2 K.B. 403 where the plaintiff had rendered services to the defendant company under a director's agreement which was void under the Companies Act. He obtained judgment for the same amount as agreed, not in contract, but in quasi contract (on a claim for *quantum meruit*). The present writer has suggested (*Mod. L.R.* vol. I., p. 76, and 53 *L.Q.R.* 449; cf. Allen, 54 *L.Q.R.* 309) that this decision means an important departure from the line of thought in *Sinclair v. Brougham*. A recent article by Mr. Denning¹ denies this and contrasts *Craven-Ellis'* case with the present one, arguing that in the former case the services were accepted by all the shareholders of the

¹ 55 *L.Q.R.* 54.

company, whereas in the present they were not. This argument seems quite unconvincing. In the present case the plaintiff and the other director, who had asked for the money, between them owned the great majority of the shares. Apart from that, there is no middle category between contracts (express or implied) and obligations imposed by the law (quasi-contract) as emphasised by the judgment of Scott, L.J., in the present case. Either there is implied consent by acceptance of services, which means an actual contract implied from conduct, or the will of the benefited party is irrelevant. If *Craven-Ellis*' case was correctly decided, it is difficult to see why the action could not succeed in quasi-contract in the present case, except on the ground that the plaintiff's payment was voluntary in law, or that, in the circumstances, there was no equitable ground for refund. As to the first ground, payment here was no more voluntary than the services in *Craven-Ellis*' case. In both the plaintiff expected consideration and made a contract which was void in law. As for equity, this is an important point. Lord Mansfield wished to blend equity and common law in quasi-contract, and American Law, following the lead of Professor Keener, has developed this idea and made quasi-contractual claims subject to equitable maxims, in which the conduct of the claimant is an important consideration. (Cf. *Restatement on Restitution*, s. 69.) A similar approach was discussed, although rejected by the majority of the House of Lords, in *Jones v. Waring & Gillow*, [1926] A.C. 670.

One of the chief obstacles to the development of quasi-contract has been the confusion between the fiction of a contract adopted by the law only as a figure of legal construction, and the application of actual contractual elements, making the fiction a reality. (On this point cf. Holdsworth, 55 *L.Q.R.* 37, who is of different opinion, and the literature there quoted.) It is submitted, with great respect, that the majority judgments in the present case also tend to blur the distinction between obligations implied in law, and obligations implied from the will of the parties, in refusing to apply the equitable doctrine of subrogation to the present case. The essence of that doctrine is the restoration of the benefit obtained in the form of a discharge from legal obligation, given an absence of any contractual obligation (since the agent has borrowed without the defendant's authority). If this is so, it is difficult to see why it should make any difference whether the would be agent had no authority for the actual transaction or no authority to accept money at all. This distinction introduces a will factor which is irrelevant to the equitable doctrine. It is all the more surprising since Scott, J.L., who was one of the majority, had just drawn a very clear distinction between the two types of legal obligation. What is a company "in a state of legal paralysis"? As long as it is a juristic person, it is capable of having legal rights and obligations. This is the only point that matters for the imposition of an obligation by the law. Paralysis, such as follows from faulty constitution, can only affect its will power, its capacity to make contracts. It does not prevent it from being discharged of legal obligations and thereby being enriched. Consequently there is no ground why equity should not impose an obligation for refund.

The only ground, it is submitted, on which the judgment of the majority could be justified is one briefly mentioned by Scott, L.J., that subrogation is an equitable principle, and that the plaintiff, who, in control of the company, and as one of the directors, was largely responsible for this state of affairs, did not come to equity with clean hands. It is this ground alone which would distinguish the case from *Craven-Ellis v. Cannons*. If based on

"voluntary act of the plaintiff" the decision would appear to be in conflict with *Craven-Ellis*² case which was binding upon the Court of Appeal. If the case goes to the House of Lords, the opportunity will possibly arise for an authoritative statement on the extent and scope of the principle of unjust enrichment in Law and Equity,² in particular in relation to the doctrine of subrogation and the meaning of "voluntary" acts in application to obligations implied by the law.

W. FRIEDMANN.

Workmen's Compensation Act, 1925, "rashness" and "added risk"

The persistent confusion of County Court judges and even so august a body as the Court of Appeal in regard to the general principles of Workmen's Compensation suggests that there is no branch of the law which more clearly requires careful exposition and concentrated attention in the schools of law. For how is it possible to explain the decision of the Court of Appeal in *Harris v. Associated Portland Cement Manufacturers Ltd.*, [1938] 4 All E.R. 831 except in terms of inherent intellectual confusion concerning logically distinct principles?

The facts of the case were that a workman, who was employed in exceedingly damp conditions which frequently necessitated his standing in water, used sacking to protect his trousers. He was entitled and authorised by his employers to dry the sacking at the end of each day, either in front of a stove or in front of a revolving fan fitted to a turbine in the machine room. The fan was not fenced. On the day when the accident occurred Harris found another man's sacking in front of the orifice of the fan and, in order to find room for his own, he placed it nearer the orifice of the fan and was compelled to hold it in position against the outward draft of the fan. Owing to the nearness of the sacking to the orifice he placed his hand within the fan casing with the result that when the sacking was caught by the fan, the workman's right hand was also caught and was severed by the fan blades. He was admittedly in the course of his employment, but the arbitrator found that, in acting as he did, he displayed such extreme rashness that he was not entitled to compensation. The rashness, said the arbitrator, involved "a peril which no workman without acting with extreme rashness would have undertaken," and therefore he was doing something which he was not obliged to do by virtue of his contract of employment.

The Court of Appeal dismissed the appeal on the ground that, while mere negligence did not take an act out of the scope of the workman's employment, there might be such rashness as to take it out of the category of mere negligence. The precedent on which Sir Wilfrid Greene, M.R. relied in his judgment was *Stephen v. Cooper*, [1929] A.C. 570, which was a case where a farm labourer, who was driving a reaping machine drawn by two horses, had walked along the pole on the machine in order to refix a chain trace which had become unfastened. In that case it was held that the workman was not acting for the purpose of, and in connection with, his employed trade or business, but was committing a foolhardy act of bravado which took him outside the Workmen's Compensation Act.

² Cf. the recent articles of Lord Wright in *Camb. L.J.* vol. vi, 305 *et seq.*; Holdsworth, 55 L.Q.R., and Friedmann, 16 *Can. Bar Rev.* 247, 369; also the discussion in L.Q.R. vols. 53, pp. 302, 448, 451, and 54, pp. 24, 201.

The scheme of compensation laid down by the legislation, although overlaid by thousands of cases, still remains reasonably clear. A workman who is injured in the course of his employment is entitled to compensation if he was doing his work or an ancillary act at the time when the accident occurred. The workman's right will not be defeated by disobedience to orders or the incurring of risks, unless by such conduct the workman places himself outside the sphere of his employment. If he is merely acting in a negligent way he remains within the sphere of his employment and is entitled to compensation, except in the circumstances expressly laid down in s. 1 (1) (b) of the Act of 1925. That subsection disallows compensation for an injury resulting from the serious and wilful misconduct of a workman unless the injury results in death or serious and permanent disablement. Accordingly, where death or serious injury results, even negligence cannot deprive a workman of his right to compensation. Negligence, it should be noted, can only occur *within* the sphere of the employment.

In Harris's case the Court of Appeal has introduced an entirely new concept of "rashness" which the House of Lords has explicitly disavowed. Such a concept, Lord Atkin observed, is quite distinct from the doctrine of the "added risk" which might, he pointed out, be more clearly described as a "different risk," that is, a risk incurred by doing something which is not within the workman's employment at all. The workman in *Stephen v. Cooper*, Lord Wright remarked, was not acting as a farm labourer when he climbed along the pole, but rather as an acrobat and in doing so he exposed himself to a peril arising from his own conduct, hence he was quite clearly outside the sphere of his employment; but in Harris's case there was no question whatever of the workman removing himself from his sphere of employment.

It is greatly to be hoped that the Royal Commission on Workmen's Compensation which is now sitting will enquire into the immense amount of litigation which is involved by determining whether personal injury by accident arises "out of" the employment. If that particular condition were removed from the Act and all accidents occurring in the course of the employment ranked for compensation, it is probable that there would be a substantial saving in time and money to all concerned. The legal profession would, however, suffer a considerable diminution of revenue.

WILLIAM A. ROBSON.

Secret Trusts: Admissibility of Evidence

The case of *Shenton v. Tyler*, [1938] 4 All E.R. 501, seems to suggest that Equity is more tender of common law rules of evidence than it is of the evidentiary provisions of statutes. The plaintiff in this case sought to administer certain interrogatories to the defendant in order to establish that the defendant's late husband had created a secret trust in the plaintiff's favour. The defendant objected to these interrogatories on the ground that they were directed to communications made to her by her husband and that such communications are protected by the old common law rule regarding the inviolability of communications between husband and wife. The case seems to have been argued mainly from the point of view of the law of evidence without particular regard to the nature of equitable intervention to enforce secret trusts, or to prevent a statute from being used as an instrument of fraud. Under the common law rule the privilege continued after the marriage had been dissolved by death or divorce (*Monroe*

v. *Twistleton* (1802), Peake, Add. Cas. 219, 220; *Doker v. Hasler* (1824), Ry. & M. 198; *O'Connor v. Marjoribanks* (1842), 4 Man & G. 435, 442). It was argued, however, that s. 3 of the Evidence Amendment Act, 1853, has qualified the common law rule so as to limit its operation to the period while the marriage is still subsisting. It is not proposed to consider this point at any length here. It is sufficient to say that Simonds, J., had no hesitation in rejecting this rather strained argument by reading this section in its proper context: as so read it is impossible to give it the wide construction it was sought to attribute to it.

The great interest of the case lies in another line of argument which the learned judge was satisfied to reject in a few words. It was urged that the result of enforcing the rule in this case might be to enable the wife for her own benefit to betray the confidence of her husband. Simonds, J., however, could not admit the possibility of making a breach in the general rule of the common law because in a particular case it may mean an injustice. That at first sight is an uncompromising, and even startling, statement from an equity judge and it becomes important to consider the nature of equitable interventions in cases of a similar kind.

It would be as well to consider in the first instance the attitude of courts of equity to the Statute of Frauds, ss. 4 and 7, since those provisions are strictly rules of evidence. Courts of Equity have consistently intervened to prevent a fraudulent abuse of the statute, under the thin veil of charging the defendant on the equities arising out of the transaction. The effect of the statute is to exclude parol evidence of certain transactions but equity in a proper case ignores the prohibition and lets in the evidence excluded by the statute. Innumerable authorities can be cited to illustrate this proposition but it will perhaps be sufficient to cite here the two leading cases of *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, and *Booth v. Turle*, (1873) L.R. 16 Eq. 182.

The doctrine of the secret trust is said, by a rather specious line of reasoning, not to conflict with the provisions of the Wills Act, 1837, but merely to operate *in personam* on the conscience of the legatee¹ or trustee-legatee after the will has operated according to its terms (*Blackwell v. Blackwell*, [1929] A.C. 318, 334, *per* Lord Sumner). Nevertheless, Lord Cairns, in *Jones v. Badley* (1868), 3 Ch. App. 362, 364, did not hesitate to say of the doctrine that "It is, in effect, a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds or rather the Statute of Wills. . . . But in this the court does not violate the *spirit*² of the statutes; but for the prevention of fraud it engrafts the trusts on the devise by admitting evidence which in terms the statute would exclude in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it." In each of these cases it may be noted that the evidence tendered is admissible according to the general rules of the law of evidence but is excluded by a statutory provision passed for a specific purpose. The case under review carries the problem a stage further. What is the position if the evidence adduced and let in by the equitable rule is not admissible according to the law of evidence? The answer to that question, it is submitted, must vary with the nature of the particular rule infringed. If the evidence tendered contravenes, say,

¹ I have used the word legatee for convenience although, of course, the doctrine operates equally in the case of a devisee, or even a person taking on intestacy; see *per* Lord Westbury in *McCormick v. Grogan* (1869), L.R. 4, H.L. 82.

² My italics.

the hearsay rule then there can be no doubt that it must be excluded. The hearsay rule is designed to secure the credibility of the evidence and as such would bind a court of equity with the same potency as it binds a court of law. The rule protecting from disclosure communication between husband and wife is clearly based on different considerations. The evidence is admissible if tendered voluntarily or, apparently, if proved by an independent witness. The rule is designed to avoid dissension and unhappiness and to safeguard the confidence that should exist between husband and wife. In a case of this kind it is difficult to see why a court of equity should not intervene to prevent the rule from being used as an instrument of fraud and to prevent a husband or wife from retaining the benefit of his or her fraud. To admit and compel the production of such evidence would certainly not contravene the spirit of the rule, and would bring the common law rules of evidence into line with statutory provisions insofar as some derogation from them on equitable grounds is made.

The secret trust is a curious institution which adds to the powers of a man over the disposition of his property. It is most frequently used to make provision for persons to whom the testator or testatrix is bound by relations which are discreditable to him or her, or which would tend to reflect discredit on the family, or upon the beneficiary. Other cases can, of course, be imagined. A testator might, for example, wish to make benefactions which would be condemned by public opinion and would tend to discredit his family (e.g. gifts which might be deemed unpatriotic, or, from an orthodox political point of view, subversive). The law recognises that a man is acting legitimately and properly in making provision for a partner in an improper relationship during his lifetime, or for the unfortunate issue of such a relationship (*Occlestone v. Fullalove* (1874), 9 Ch. App. 147, *per James, L.J.*), and it would be a retrograde step to introduce limitations on powers which serve this end, where those limitations are not justified by the principles upon which these powers rest.

E. WYNDHAM WHITE.

Enforcement of Foreign Judgments by Bankruptcy Proceedings

The judgment of the Master of the Rolls in *Re a Judgment Debtor* (No. 2176 of 1938), [1939] 1 All E.R. 1, combines *elegantia iuris* with the functional method of interpretation of statutes which had already been illustrated by his decision in *Grein v. Imperial Airways, Ltd.*, 55 Ll.L.R. 318.¹ (See *Annual Survey of English Law*, 1936, p. 357.) The present case lays down that bankruptcy proceedings may be issued under a foreign judgment registered in accordance with the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The reason for not following the rule laid down in *Re a Bankruptcy Notice*, [1898] 1 Q.B. 383, where the creditor had been denied the right to start bankruptcy proceedings under a judgment registered under the Judgments Extension Act, 1868, was mainly the difference between optional registration under this Act, as also under the Administration of Justice Act, 1920, and registration as the sole method of enforcement of foreign judgments under the Act of 1933. The much longer period for registration allowed under the later

¹ See *Mod. Law. Rev.*, Vol. 1, p. 156.

Act is also explained by this difference. The appointment of a receiver by way of equitable execution which could be obtained under the Act of 1868 (*Thompson v. Gill*, [1903] 1 K.B. 760) would *a fortiori* be available under the Act of 1933. It is also a safe prediction that under this Act a judgment summons under the Debtors Act will be allowed to issue although this is impossible under the former Act (*Re Watson*, [1893] 1 Q.B. 21).

Considering the effect of the various statutes dealing with registration of foreign judgments it seems that if it is at all desirable to differentiate between judgments from the United Kingdom or from the British Empire and from those foreign countries to which the Act of 1933 applies, better facilities for enforcement should be afforded to judgments registered from the United Kingdom and the British Empire. The present position which is exactly the reverse would seem to call for legislative action.

J. UNGER.

Income Tax Cases

The Courts in recent years have been much concerned, in revenue cases, with the modes by which the speculative builder arranges his finances and disposes of his property—two of these cases, viz.: *J. Cronk & Sons Ltd. v. Harrison*, [1937] A.C. 185, and *Inland Revenue Commissioners v. John Emery & Son*, [1937] A.C. 91, were discussed in 1 M.L.R. 163. In *B. C. Utting & Co. Ltd. v. Hughes*, (1938), 55 T.L.R. 144, the appellants were speculative builders who acquired and developed building estates; in some cases the company sold houses outright for cash but in others it granted, in consideration of a cash premium, a 99 years' lease subject to an annual ground rent. Following the decision in *Emery's case (supra)* the Revenue sought to bring into charge both the premiums and the market value of the ground rents. For the company it was contended firstly—relying on the Irish case of *Birch v. Delaney*, [1936] I.R. 517—that the receipts from these two sources were income arising from land and not from trading and that they were therefore taxable only under Schedule A (*Salisbury House Estates Ltd. v. Fry*, [1930] A.C. 432); in the alternative it was argued that the ground rents—or, as Macnaghten, J., more properly termed them, the reversions expectant on the determination of the leases—should be treated as part of the stock in trade of the builder and therefore brought in only at their cost price until they were realised, if at all.

The first part of the company's contention was not pursued when the case came before the Courts. The main criticism of their alternative argument is that the ownership of freehold reversions was not part of the company's business of speculative builders so that no question of the inclusion thereof as stock in trade could arise; in the second place, it was not possible to ascertain the cost of these ground rents since none had been purchased by the company, whose books did not provide material for anything other than a very empiric estimate of the supposed cost.

In the result Macnaghten, J., held that, as the ground rents were readily realisable, their market value fell to be included in the builders' accounts as a taxable receipt in the year in which the 99 years' lease was granted. This decision accords with that of the House of Lords in *Emery's Case (supra)* since this turned upon the fact that ground annuals (cf. ground rents) are readily saleable so that their market price can be easily ascertained.

A prominent feature of present-day capitalism is the system of interlocking companies whereby many of the vital operations of the principal company are dealt with through one or more subsidiary companies and are thus concealed, save as regards their ultimate results, from the shareholders of the parent concern. Two recent income tax cases have indirectly thrown an interesting sidelight upon this system though, of course, in each it was a taxation point which was in question. *Laycock v. Freeman Hardy & Willis Ltd.*, [1938] 4 All E.R. 609 (C.A.), and *Briton Ferry Steel Co. v. Barry*, [1938] 4 All E.R. 429, turned upon the meaning of the words: "if any person succeeds to any trade . . . which was carried on by another person . . ." in Rule XI (2) of the Rules applicable to Cases I and II Schedule D, Income Tax Act, 1918.

In the former case the respondent company, which sold boots and shoes retail, had formed two subsidiary companies who manufactured and sold their finished products to it; these companies went into liquidation and the liquidator conveyed all their assets and goodwill to the principal company which then proceeded to manufacture its own shoes in factories previously occupied by its subsidiaries. The contention of the Revenue that Freeman Hardy & Willis Ltd. had succeeded to its subsidiaries' businesses was rejected by the Court of Appeal on the ground that the businesses carried on by them were not the manufacture of boots and shoes but the selling of manufactured goods *wholesale*; the respondent company, after the transfer, carried on the business of manufacturing boots and shoes and selling them *retail* and this, of course, was quite a different business; the profit arose not when the manufactured goods were transferred to the retail shops but when they were sold to the public retail.

The first case seems to have turned on its own rather peculiar facts so that the Crown was refused leave to appeal to the House of Lords. In *Briton Ferry Steel Co. Ltd. v. Barry*, the appellant company manufactured steel bars which were supplied to five subsidiary companies for manufacture and conversion into tinsplate; the produce of these companies was disposed of in the market by yet another subsidiary. The manufacturing companies were wound up and the whole of their assets and goodwill conveyed to the principal company who carried on the manufacture of tinsplate in the same mills. It was contended for the Briton Ferry Co. Ltd. that since it already controlled the production and sales of its five subsidiaries, there was no trade to which it could succeed. This contention was rejected by Macnaghten, J., who held that as the principal company now manufactured tinsplate, it was carrying on the same business as its subsidiaries had done, so that, in the circumstances, it had succeeded to their businesses.

It will be seen that the two cases turned on the identity of the business carried on by the successor; in the *Briton Ferry Steel* case the trade, i.e. manufacture of tinsplate, was the same both before and after the change though all the operations were now gathered into the principal company's hands. In *Laycock v. Freeman Hardy & Willis Ltd.* the subsidiaries' business was that of manufacturing boots and shoes and selling them *wholesale*; this was converted into a business of manufacture and sale by retail which was a business of a different nature; there could thus be no succession since, on amalgamation, the subsidiaries' businesses had entirely ceased. It must be observed that in each case the subsidiary companies, though wholly controlled and owned by the principal company, were separate legal entities for all purposes of the law including taxation.

A. FARNSWORTH.

REVIEWS

SOME MAKERS OF ENGLISH LAW: The Tagore Lectures, 1937-8.

By SIR WILLIAM HOLDSWORTH. Cambridge University Press, 1938.
xi + 308 pp. 15s. net.

Sir William Holdsworth's latest contribution to the literature of legal history consists of the twelve Tagore Lectures delivered at Calcutta University in the winter of 1937-8. They are much more than a collection of legal biographies; as the preface justly claims, they constitute nothing less than a "short biographical history of English Law." Indeed, save perhaps in the last two lectures, the biographical element is very slight, sufficient only to indicate the place of the person in the wider canvas of history. Thus Littleton and Fortescue do no more than lend their names to a lecture which sketches the growth and achievements of the fourteenth and fifteenth centuries. St. Germain, More, Ellesmere and Bacon become events in the early history of Equity. The lecture on Hardwicke and Eldon contains by far the best short account which has yet appeared of the fixation of the principles of Equity and of its relations with the Common Law. Perhaps the best lecture of all is that entitled "Renaissance, Reformation, and Reception of Roman Law"; it is an admirable sketch of one of the most critical periods in English legal history inserted with perfect balance in its European setting; here the biographical formula is completely discarded.

It will be seen that this method of treatment places in the hands of the student, in compact form, much of the valuable material contained in the twelve volumes of the *History of English Law*, and this in itself would be sufficient to place the present work in the category of standard students' textbooks. But this is not all. No doubt the biographical approach is artificial in that it is compelled to ignore, or at least to slur over, those anonymous contributions, such as the Forms of Action, which provide the raw material of individual effort. None the less, this very process of selection has enabled Sir William to produce that rarity, a textbook of legal history which can be read as a whole; one, moreover, which perhaps for the first time gives a vivid impression of unity not merely in the development of isolated branches of the law but in the development of English Law as a whole. It is a historical demonstration of the existence of an organic individuality, of what Sir William calls the "spirit of the rules of English law." Nor is the reader left in doubt as to the nature of this spirit. To Lord Macmillan, who in his *Two Ways of Thinking* has reminded us of one aspect of the individuality of English law, it would no doubt be an attitude of mind. To Sir William it is this and something more: "English lawyers have never ignored legal theories, but they have declined, as Blackstone's *Commentaries* show, to be mastered by any one of them. They have preferred to build upon the stable foundation of the concrete facts of life and the needs of human beings, rather than upon the shifting sands of the conflicting theories of ingenious philosophers." Add to this the "historical tradition" which to Sir William is the product of the English system of case law, and we have two principles which are the essential clues to the development of English law.

These two principles might also serve as Sir William's confession of faith. The concluding pages of these lectures reveal him as a jurist of the historical school, with all its negative virtues, and with enough of that

pragmatism which he has imbibed from English history to turn those virtues into something like the vice of fatalism. Perhaps it is this attitude to the present which makes his treatment of the nineteenth century so much less satisfactory than that of the earlier period, for it can scarcely be sympathetic to the mass of legislation produced by the reformed Parliament, and to write without sympathy is a thankless task. The pages dealing with Bentham and Austin, and in particular the last lecture on Maine, Maitland and Pollock, are purely biographical. We are constantly reminded of their influence on English law, but nowhere is that influence displayed; in consequence, the story of the actual development of English law ceases with the eighteenth century, and the balance of the book is to that extent disturbed.

No doubt Sir William's own researches have not yet covered the ground in the detail which is proper for future volumes of the History. No doubt the influence of Maitland and Pollock is essentially of the intangible sort which can only be guessed at by us who live in the shadow of their names; a return to the academic tradition of the twelfth century, a reunion of law and the universities, with who knows what effect upon the "spirit of the rules of English law." But the influence of Bentham has already been traced in the pages of Dicey's *Law and Opinion*, and we cannot help thinking that a sketch of legislative developments during the nineteenth century on the lines indicated by Dicey would have been a more fitting conclusion to such a book than the present account of Maine, Maitland and Pollock, however interesting that account may be.

The last few pages, headed "Conclusion," partake more of the nature of special pleading than of the general issue. Mention of our "plague of bureaucrats" leads Sir William to speak almost in the language of mysticism of the necessity of assimilating statute law into the "framework of the legal system." This, moreover, can be achieved only by retaining the "old and tried canons of interpretation," and those who would allow more scope to the Judges are threatened with the direst consequences if their theories are put into practice. Then follows an attack on "fundamentalist" jurisprudence, criticised, somewhat strangely, on the ground that it advocates a return to the pure Benthamite canon of utility without taking heed of the lessons of history. But history is large enough to provide lessons to support any shade of opinion; it is merely a question of selection. Sir William chooses as his only true canons of interpretation those laid down by Coke and the conveyancers, and justifies his selection by the happy results they achieved during the settled economy of the seventeenth and eighteenth centuries. Another historian, seeking for a parallel to the change from the industrial capitalism of the nineteenth century to the collectivism (to use Dicey's consoling euphemism) of the twentieth, might find it in the change from feudalism to capitalism in the later Middle Ages; he would discover that Berekford and his companions of the fourteenth and fifteenth centuries helped to bridge this gulf by interpreting their statutes in a way very similar to that condemned by Sir William, without the "disastrous results" which Sir William prophesies; and that in particular their laxity of interpretation certainly did not "prevent the assimilation" of the Edwardian legislation "into the body of English Law."

History cannot prove which view is the more appropriate for applying to the problems of the present. Nor can it ever be used as an argument sufficient in itself against change. Its task is to reveal the true nature of

the law of to-day, and thus to make possible a more accurate estimate of the effects which change will produce, lest by accident we destroy that which we wish to retain. The value of *Some Makers of English Law* to the student and the law reformer alike is its demonstration of the unity of English Law, a unity of "spirit" rather than of interdependent rules. The validity of any criticism we have ventured to make in no way detracts from that value.

A. D. HARGREAVES.

THE PUBLIC CORPORATION IN GREAT BRITAIN. By LINCOLN GORDON. Oxford University Press. 350 pp. 16s.

This book, like the others which have recently appeared on the same topic, is written round the central theme of the methods of control that are (or might be) adopted to keep the "semi-independent" public corporation within the bounds of administrative rectitude, though it is of general interest since it contains an assessment of the successes and failures (chiefly the former) of what other writers have agreed to call "public enterprise." It is of special interest to the administrative lawyer, since it demonstrates—by implication rather than explicitly—the poverty of our English legal conception of the status of the newer types of administrative institutions, which has made it so difficult to find the right place for them in the framework of the constitution.

The root of the trouble is that the English law of corporations has remained substantially unaltered for far too long. There are of course important exceptions to this generalization, the chief being the complex network of rules which has grown up round the limited liability company and the local authority. Fundamentally, however, things are much the same as when Lord Eldon made his famous observation that the pre-1835 Municipal Corporations "were situated precisely the same as individuals; they held property not on trust, and over such property the Corporation exercised the same rights as individuals did over their own property. There was no difference known to the law." Even though a lot has happened to the law of trusts since then, and notwithstanding the fact that Mr. Gordon is writing for the most part of statutory corporations, he can still follow in Lord Eldon's footsteps by saying that—

"Even within its own class the British public corporation differs from Continental examples like the *Reichspost* and *Reichsbahngesellschaft* by the extraordinary lengths to which the principle of autonomy has been carried. Significant of this difference is the legal ownership of its plant by the corporation itself, whereas in law the corresponding German bodies are merely administrative organs operating special property (*Sondervermögen*) of the State. The board of directors of a British public corporation is given a portion of the economic field in which its responsibility is in principle unfettered."

Mr. Gordon's chief findings are as follows: The Public Corporation is a necessity in the modern world because "it is clear that a private monopoly, no matter how limited by law, can offer no assurance of maximum facilities at cost". An important conclusion, having regard to the fact that he writes with full cognizance of the attempts that have been made by administrative lawyers in the U.S.A. to achieve this end. The positive problem of control "is focussed in practice upon the method of choosing the governing board," which should be "constituted through

appointment by some disinterested body. . . . The device of Appointing Trustees evolved for the L.P.T.B. is profoundly unsatisfactory." As to the decision of contested issues as between a corporation and the consumers of its services—

"Where the potentialities of discrimination concern specific rates of charge for the service, or provision or withdrawal of particular facilities, [the check imposed by an Advisory Committee] is powerfully reinforced by right of appeal to an outside authority. Experience with the P.L.A., C.E.B., and L.P.T.B. indicates that such appeal will be rarely if ever utilised, but its potential use forces the corporation to justify to its consumers any particular rate or the refusal of any particular service. Such appeals should be treated non-politically, and are best decided by expert quasi-judicial tribunals like the Electricity Commissioners or the Railway Rates Tribunal."

Mr. Gordon's treatment of the major issue of external control is along the now familiar lines of calling the *ad hoc* "quasi-judicial" body into existence to redress the balance of the old "ordinary" courts—

"To combine expertise and continuity, with ultimate responsibility to Parliament," he writes, "the best form of authority appears to be a semi-autonomous technical sub-department like the Electricity Commissioners. Such bodies should approve applications for extensions of borrowing powers, for general changes in charges, and for new works and abandonments."

The book is excellently written. It deals comprehensively from both the analytical and historical points of view with the corporations which are used as illustrations of the main theme; the Port of London Authority, the Central Electricity Board, the British Broadcasting Corporation, and the London Passenger Transport Board. The treatment of what might otherwise be rather a hackneyed topic is fresh, and a lot of new ground is broken in the chapter on the Port of London Authority. The concluding chapter is a triumph of condensed argument. *The Public Corporation in Great Britain* is likely to become the standard work on the subject, and to remain so for some time to come.

T. S. SIMEY.

THE WORLD CRISIS. By the PROFESSORS OF THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES. Longmans, Green & Co. London. 1938. xii and 285 pp. 10s. 6d.

Both title and preface of this stimulating collection take it for granted that the world is at present passing through a major crisis. Whether, in assuming this, the editor is guilty of overstatement depends largely on what the observer of world events regards as the essentials of a state of health and normality, and it cannot be expected that each member of this distinguished team should be equally outspoken on this point. Yet the relatively high degree of homogeneity among the teachers of the Graduate Institute of International Studies minimizes the dangers of undue generalisation involved in any attempt at discovering the common denominator of their postulations:

(1) Humanity is "an essential unity," a fact "which is more firmly established and more clearly revealed with every step in scientific and technical progress." (Rappard, p. 59.)

(2) The most desirable object of international relations is peace, and peace can only be achieved by good will (Kaeckenbeck, p. 241), which is in itself largely an educational problem (Potter, p. 129).

(3) The Covenant of the League—whose failure is more than once apologetically explained by its youth—is a step towards the integration and transformation of the international society, although “in certain memorable circumstances” members of the League have been “unable or unwilling to make use of the instrument” (Mantoux, p. 3).

(4) International free trade and division of labour depend upon peace and goodwill among nations (von Mises, p. 250) and are preferable “to armaments and protectionism, to barriers against the movability of commodities, labour and capital, to militarism and dictatorship” (*ibid.*, p. 273/4).

(5) The structure of international relations, which rests on such principles as the above, is “undermined by forces set loose by mass civilisation” (Röpke, p. 291).

(6) Although “democracy has failed only where it has never existed,” it needs adapting to its environment not only in space, but in time (Mantoux, pp. 71, 77).

In particular, the essays by Bourquin and Röpke make it clear that the “return to normal conditions” (Whitton, p. 310) depends less on good or bad will among the nations and on their ignorance or enlightenment than on the social forces which are at work in the international society—forces which can hardly be stemmed by the watchwords of progressive liberalism.

Only a few examples can be considered here, and they must of necessity be treated somewhat categorically. (The present writer has discussed these questions in more detail in a recent article in the *American Journal of International Law*, Vol. 33, No. 1).

The inefficiency and final breakdown of the League in the political sphere, for instance, seem incomprehensible until one realises the initial incompatibility between the aim of the Covenant to create a community law and the attempt in the rest of the Peace Treaties to establish France's hegemony over the former Central Powers. This unholy alliance between power politics and an embryonic community law could not endure: it is remarkable that it lasted as long as it did.

Again, in the conflict between totalitarianism and democracy, has not one of the mainstays of Fascism and National Socialism been the growing consciousness in both Germany and Italy that in a system of power politics the ambition of a dissatisfied or vanquished State to become a World Power can only be achieved by the utmost concentration of national resources?

Finally, is there more than a difference in degree between the Powers who blatantly admit that, in a society based on the rule of force, international law is ultimately subservient to the requirements of that “higher” law, and the other Powers who, while “upholding” the law, render tribute to the reign of power politics when they grant legal recognition to conquests achieved not only by force of arms but in direct contravention to a multitude of broken agreements?

A closer investigation of such problems as the relation between the legal superstructure and the deeper layers of the social substratum of the international society would probably have modified some of the constructive suggestions put forward by the contributors to this volume. Although we

quite agree with the view that peaceful change and collective security are inseparable, and that disarmament cannot precede the establishment of a system of community law (Whitton, p. 296), we should like to emphasise that this objective can only be achieved at the price of a complete transformation of the existing international society.

As democracies are now striving to equal the envied efficiency of totalitarian States, an efficiency measured according to the standards of a society based on the rule of force, the conditions which seem abnormal to the authors of this volume are likely to prevail in a yet more marked form. This mechanism is already set in motion. Only its first slow movements are analysed in this volume, but they will accelerate in accordance with the rough but nevertheless calculable laws of the world balance system which is at present taking shape. The choice seems to lie between three possibilities: the wholesale capitulation of the forces on one side of the balance, a major war, or a policy of far-reaching and conscious planning. Even the failure of such an attempt can scarcely bring about results more disastrous than those inherent in the prevalent attitude of *laissez-faire*.

G. SCHWARZENBERGER.

LAW OF BANKING. By Professor R. S. T. CHORLEY, M.A. London: Sir Isaac Pitman & Sons, Ltd., 1938. 350 + xxiv pp. 12s. 6d.

Those who have read and appreciated Professor Chorley's *Gilbart Lectures* and his extremely able criticism of current case law in this and other law reviews will welcome this latest contribution to the literature on Banking Law. The subject is one which needs very careful handling: it requires a knowledge of the practice of bankers such as very few lawyers can claim to possess and is one with very ill-defined boundaries. It not only covers a good part of mercantile law but also impinges at many points on other departments of the law such as real and personal property. Professor Chorley is admirably equipped for his task and the result can be seen in this textbook which is a model of its kind, having regard to the purpose which it is intended to fulfil.

Students of Banking Law, most of whom are bank officers, have hitherto laboured under certain disadvantages. Some of the textbooks available to them are written by lawyers for lawyers and assume a knowledge of the law in general such as a bank clerk cannot be expected to possess. Others are written by bankers for bankers and are unsuitable as they in their turn assume experience—in this case of banking practice—which is not open to lawyers or to the junior members of the staff of a bank. Professor Chorley's main object has been, to use his own words, "to provide both for legal students who have had but little, if any, practical experience of the work of banks" and for "those whose life work is intended to be banking." We have no hesitation in saying that, taking the book as a whole, this aim has been achieved and that *Chorley on Banking* should, in our opinion, find its place as the leading textbook for students of banking law whether they be apprentices to the law itself or destined for a banking career. We would go further than this and express our belief that this book will be of considerable service both to legal practitioners and to senior members of the staffs of the banks. Nowhere else will they find the main principles of the law stated more clearly or concisely. The trend of the law in the direction of its growth is ever before the learned author's eyes and current problems of banking law—of which there are

many—are dealt with impartially and trenchantly. The development of banking law in the future is somewhat delicately poised on the necessity for keeping the balance between the interests of the customer and the avoidance of the imposition of burdens on the banker which are such that they may have repercussions on that prompt discharge of a banker's obligations to the customer which, perhaps, is the most noteworthy feature of English banking practice. Professor Chorley is fully alive to this aspect of the situation, and Chapter V, which deals with the payment of cheques by bankers, furnishes an illustration of the admirable manner in which he deals with questions of this nature. The value of the book is enhanced by references, when necessary, to the larger textbooks, such as those of the late Sir John Paget and Mr. Heber Hart, K.C. The citation of cases is ample without being overdone. A useful appendix on the Stamp Acts, in so far as they affect banking, is added and the more important types of banking forms and precedents are included.

Lawyers and bankers do not always approach a banking transaction from the same angle, and some of Professor Chorley's conclusions on doubtful points may be challenged by the bankers. But a reviewer who is a lawyer will find little to quarrel with. Many of the disputed questions are, perhaps, somewhat hypothetical owing to the disinclination of bankers to become the victims of litigation, but this does not diminish their interest to the lawyer, and Professor Chorley has, in our opinion, been well advised to deal with them. It has happened, on occasion, that the so-called "theoretical" point has developed into one of great importance practically, e.g. the case of *Joachimson v. Swiss Bank*, [1921] 3 K.B. 110.

Such slight defects as the book possesses seem to be due to the exigencies of space. To compress the law of banking into three hundred pages is a task of the greatest difficulty, and it has, as we have already stated, been carried out by the learned author with great skill. But here and there condensation has resulted in a certain obscurity which may cause some degree of bewilderment to the novice. For instance, the statement on page 94 of the effect of the ratification of a forgery, though clear enough to one accustomed to legal methods of thought and modes of expression, may puzzle the readers for whom the book is primarily designed. The section which deals with "Third Party Claims" (see in particular note 1 on page 169) also seems to presuppose an acquaintance with legal principles which such students would not normally possess. But such lapses from the general scheme of the book are few and far between and do not lessen the merits of this admirable introduction to a difficult branch of mercantile law. We would like to conclude by expressing the hope that Professor Chorley will not be content to occupy the position of an exponent of the elements of the subject, but will utilise his wide knowledge and his scholarly gifts hereafter in the further elucidation of the many important problems which exist and still continue to crop up in the field of banking law.

H. C. GUTTERIDGE.

PRIVATE INTERNATIONAL LAW. By G. C. CHESHIRE. Second Edition. Oxford University Press, 1938. 25s.

One of the most important changes introduced in the second edition of Dr. Cheshire's treatise is the addition of a new chapter on the problem of classification. This is not merely a difficult yet isolated problem in an already sufficiently difficult branch of the law. Its solution depends upon

the application of the methods of analytical jurisprudence to the mental operations involved in the decision of international cases. Whatever the limitations of analytical jurisprudence it is only by this method of investigation that law is invested with the character of a science. The magnitude of the problem cannot be appreciated and no solution can be found without examining what is being classified and why classification is undertaken. Dr. Cheshire proceeds, therefore, upon correct lines in dealing separately with the different subject-matters of classification. Yet the first matter discussed, namely how to ascertain what is meant by concepts such as "domicil" or "place of contracting" does not concern classification. The problem is one of interpretation of terms of English law. Similarly, the difficulty of ascertaining the "Class of a Transaction" does not seem to be connected with classification. The instance given of a gold-clause concerns the construction of the terms of a contract and is treated as such in the chapter dealing with the proper law of a contract.

Dr. Cheshire's analysis of classification, in outline, distinguishes primary classification of the issue, the matter in dispute between the parties, required in order to find the *lex causae*, and to be carried out according to the *lex fori*, and secondary classification of "some legal rule, institution, or transaction," required after the *lex causae* has been ascertained, and to be executed according to the *lex causae* with the exception of rules of procedure. The view that what is usually stated as the single problem of classification really represents a dichotomy of problems, each requiring its particular method of solution, is fully convincing. But this thesis does not seem to be supported by the explanation of the two types of classification. The definition of "primary classification" is so wide that "secondary classification" becomes meaningless. Decisions such as *Ogden v. Ogden* or *Re Wilks* involve in Dr. Cheshire's opinion problems of primary classification, the "issue" being whether Art. 148 C.C. regulates capacity or formalities of marriage, or whether s. 33 of the Administration of Estates Act, 1925, falls within the province of administration or succession. As an instance of secondary classification Dr. Cheshire puts the case of a rule of French law which allows actions against a partner only after proceedings against the partnership property. But the question whether this rule deals with the substance of the obligation or with procedure seems to constitute an issue of exactly the same nature as whether Art. 148 C.C. relates to capacity or form. It seems impossible to draw a distinction on the ground that in *Ogden v. Ogden* the *lex causae* was unknown before Art. 148 had been classified whereas in the action against the partner it was established that "French law is the *lex causae*, i.e. that all matters in issue between the parties except those relating to procedure are to be governed by the law of France." Could it not be said that in *Ogden v. Ogden* French law was the *lex causae* except as regards matters of form, or that English law was the *lex causae* except as regards matters of capacity? It would only be possible to consider establishment of the *lex causae* as the test between primary and secondary classification if there were only one such *lex causae*. Yet it is of the essence of Private International Law cases that they are governed by two or more, but never only one *lex causae*. In conclusion of his discussion of the main theories of classification Dr. Cheshire states that his interest lies not so much with them as with the practice of the Courts. This practice is not based on deliberation commensurate to the difficulty of the subject but—in Dr. Cheshire's words—"has been adopted unconsciously." If it is at all possible to deduce any theory from the cases it

may well be doubted whether it deserves more attention than can be due to the pronouncements of the not very impressive authority of the unconscious lawgiver. For the study of classification, therefore, English case law is valuable for the variety of the questions put rather than the answers given.

These remarks must of course be confined to classification. Other parts of the treatise have gained, indeed, by the adoption of a less independent attitude towards precedents. Although most of the views expressed in the first edition have been retained, even where as the result of abandoning the vested right theory change might have been expected, the distinction is now much clearer between the law as it is and what in the author's opinion it ought to be. This is well illustrated by the discussion of *Shaw v. Gould*. Where criticism, however justified, appeared futile, as with regard to *Vadala v. Lawes*, it has been omitted. Where, as in the case of *renvoi*, a problem still appeared unsettled, the author has not hesitated to enlarge his treatment of the topic so as to add to the account of the relevant decisions a number of arguments based on logic and principle. The open intervention in the conflict of theories and the full discussion of novel difficulties, such as gold-clauses or the Nuremberg racial laws, does credit to the intellectual courage of Dr. Cheshire and must consolidate the unique authority acquired already by the publication of the first edition of his treatise.

J. UNGER.

LAW OF MORTGAGES. By HAROLD GREVILLE HANBURY and C. HUMPHREY MEREDITH WALDOCK. London: Stevens & Sons and Sweet & Maxwell, 1938. 502 pp. 25s.

Although the authors point out that the student's acquaintance with the law of mortgages is limited to the chapter on the subject in books on real and personal property and suggest that their book is designed to provide a link between the monumental works on mortgages and the matter available for the student, presumably with a view to assisting the latter, the present reviewer feels that the book succeeds so admirably in its concise treatment of the law of mortgages that it will prove to be most welcome even as a reference book to the practising lawyer. Indeed the latter would do well to read the book from cover to cover instead of treating it only as a book of reference. The form of simple mortgages being so well settled and the form of the building society mortgages which must comprise three-fourths of the mortgage transactions being unalterable like the laws of the Medes and Persians, the practising lawyer rarely considers the principles on which the law is based. He even forgets what a curious document the English mortgage is so used is he to its strange omissions. The learned authors recall to him Maitland's comment which is as true to-day as ever it was. Certainly his efforts to convince his client that notwithstanding the legal date of redemption the equity of redemption still remains and to explain why the mortgaged property is let for 3000 years will derive considerable assistance from the early chapters. He will also find there that the difference between mortgages, possessory securities and liens and equitable charges and non-possessory liens is clearly set out, with a useful statement of the remedies available to a mortgagee, a chargee and a pledgee. In Chapters II and III the doctrine of clogging the equity of redemption is discussed and the summary on page 106 of the results of the leading cases is so clear and brief that it might be learned by heart.

It is, notwithstanding this summary, a most difficult question for the draftsman to decide that it is proper to include in a draft mortgage a clause which appears to give the mortgagee either an unfair advantage or entitle him to inflict a penalty. For example, if a lender advances money on a speculative security consisting of a lease and the goodwill of the retail trade carried on on the leaseholder's premises to an amount more than the market value of the security with a covenant that the borrower will carry out alterations to make the premises more commodious for business, is he justified in requiring the borrower to agree to pay him a proportion of the profit which the borrower may realise on disposing of the business? This type of speculation is not uncommon and presents obvious difficulties.

To say, as the learned authors do, that the collateral advantage is valid unless the penalty is one against which the Court will give relief is of little assistance unless the draftsman is fully aware of the principles on which the Court relies in deciding whether it will give relief. Now Fisher says that a covenant that if the property is sold, the mortgagee is to have a bonus, is bad, whereas, as the authors point out, the Court of Appeal in *Biggs v. Hoddinott* decided that collateral advantages will not be unconscionable unless extorted by exploitation of the borrower's position.

It seems that in the example quoted above where the borrower could not possibly obtain a loan of the amount required without going to a money-lender and paying a very high rate of interest, the advantage is not unconscionable in all the circumstances, but even with the benefit of the author's remarks it remains a vexed question.

In emphasising (p. 111) that the legal reversion now retained by the mortgagor is a form of real property whereas an equity of redemption being an equitable interest in a term of years is personal property, the learned authors carry their view so far as to suggest that care must be taken to see that the mortgagor who is disposing of his whole interest in his mortgaged property vests both his interests in the transferee. No authority for this proposition can be found either in the standard works or in the latest edition of Prideaux's *Precedents on Conveyancing*, and it is submitted with respect that the doctrine of merger has been overlooked. In other words, as long as both the legal reversion and the equitable interest remain in the same person they merge (cp. *Re Selous*, [1901] 1 Ch.), and that in the absence of any expression to the contrary when the mortgagee disposes of the mortgaged property he is considered to have disposed of all his interest therein. On death the whole interest of the borrower passes to his legal personal representatives, and even in the uncommon event of appointment of separate executors for the real and personal estates it is considered that the equitable right of redemption is so much attached to the legal reversion as to be part of it and to pass with the real estate without express reference.

The section on priorities is careful and contains much of vital interest to the solicitor's branch of the profession.

It may not be out of place to comment on the trivial mistakes and misprints which are all the more curious since the manuscript must have been read by more than one person: For example: page 11, line 22, and page 346, line 7, for 'Land Registry' read 'Land Charges Registry'; page 38 (vi) and page 76, line 6, for 'L.P.A.' read 'L.R.A.'; page 59, line 12, for 'contrained' read 'constrained'; page 74, line 16, for 'inferior' read

'superior'; page 90, line 21, the comma should be printed before, not after, will; page 91, line 32, 'oppressive' is usually spelt with double s. Page 12-3, line 19, for 'are' read 'is.'

From the list of areas where registration of title is compulsory the County and City of London have been omitted. Page 161, summary judgment under Order 14 for the amount of the mortgage debt is no longer available.

Page 423, there is no company called "Lloyds Bank Nominee Company."

These small matters which can be corrected in the second edition do not detract from the general merit of the book, which will certainly fill a long felt want.

S. H. E. BURLEY.

THE FUTURE OF THE COMMON LAW. By VARIOUS AUTHORS. Harvard University Press. London: Humphrey Milford. 1937. 247 pp. 12s. 6d.

This volume consists of seven addresses given at the Harvard Law School "Conference on the Future of the Common Law" which formed part of the Tercentenary Celebrations of the founding of Harvard College. Part of the discussion on the addresses is also included. Dean Roscoe Pound opens with "What is the Common Law?" the following addresses dealing with common law in different parts of the world.¹ Most English lawyers are a little sketchy about the law governing the Dominions and Colonies; Sir Maurice Amos explains this, seeing the common law and the civil law as systems that can work together. Justice Stone is the only writer who deals with the most pressing problem of the common law, namely the attitude towards statutes and administrative tribunals. His case is presented with admirable clarity. Lord Wright reviews recent developments in England, mainly in the field of tort; it is a good thing to find a Law Lord who shows anxiety for sundry reforms. All the writers, Dean Pound avowedly and the others incidentally, have had to give some answer to the question of what it is that distinguishes the common law. Dean Pound gives too many answers for the reviewer to mention, but the position of the common law judge is the dominating theme. His statement that "the common-law world had no public law till the latter part of the nineteenth century" (p. 19) is queer, particularly when contrasted with Sir Maurice Amos's observation that "the common law is deeply penetrated, as the Roman law is not, with notions and principles of public law" (p. 29). Apart from Constitutional law as traditionally taught, there has been a mass of administrative law in England for three centuries; it is conveniently found in the older books on the office of Justice of the Peace. The nature of the common law really requires exposition by comparison with Romanesque law; if Sir Maurice Amos will expand his paper into a stout volume the common law will be better understood. And if Justice Stone can convert enough common law judges to his outlook our judicial process will be vastly improved.

¹ Sir Maurice Amos on Common Law and Civil Law in the British Commonwealth of Nations; Lord Wright on Common Law in its Old Home; Hon. Harlan Fiske Stone on Common Law in the United States; Hon. Henry Hague Davis on Common Law in Canada; Hon. Henry Hanna on Common Law in Ireland; Hon. Frederick Evan Crane on The Spirit of the Common Law.

R. M. JACKSON.

GATLEY ON LIBEL AND SLANDER. Third Edition. By RICHARD O'SULLIVAN, K.C. Sweet & Maxwell, 1938. 1181 pp. 52s. 6d. net.

First published in 1924, *Gatley on Libel and Slander* (which won for its author the degree of D.C.L. from the University of Oxford) was welcomed by the profession as a textbook of value.

A second edition of this "great achievement of learning, labour and ability"—to quote Mr. Justice McCardie's appreciation—appeared four years later; and now Mr. Richard O'Sullivan, K.C., has accomplished the task, for which he was designated in Dr. Gatley's will, of preparing a third edition.

All will agree with the view, expressed in Lord Atkin's Foreword, that the completeness of Dr. Gatley's survey of the law of defamation has been carefully maintained by the editor's experience and diligence, and that the third edition of *Gatley* is a work which may be strongly recommended to prospective plaintiffs and defendants and to their legal advisers.

Mr. O'Sullivan has brought the authorities, including Dominion and American cases, up to date, and has re-written those portions of the book which have been affected by recent changes in the law and in rules of procedure.

The subject of "payment into Court," an operation which is no longer hedged around with the difficulties that used to hamper the defendant in an action for defamation, is fully treated; and the notes to the Law Reform (Married Women and Tortfeasors) Act, 1935, which enables the author, the printer, and the publisher to demand equitable contribution *inter se*, are excellent.

In former editions the peculiar position of the convicted felon in relation to actions for defamation was not touched upon. This omission has been detected by Mr. O'Sullivan, and he offers a considered opinion on a doubtful point. If his opinion is accepted, the incarcerated felon may be defamed with impunity, provided the libeller can be certain that he will remain in confinement for a period of six years. For the Felony Act, 1870, disables him from bringing an action while he is imprisoned, and his disability is not an "incapacity" which prevents time from running under the Statutes of Limitation. The recommendation of the Law Reform Committee that time should not run against a convict until he is lawfully at large or until an administrator or curator is appointed impliedly supports Mr. O'Sullivan's view; but, as the editor notes, there are those who differ from it.

It was not for the editor to criticise or disapprove of forms of interrogatories which the Courts have pronounced to be correct. But why, where "fair comment" is pleaded, is the defendant asked whether he in fact believed "that the said opinions were true"? Is not the real question whether the said opinions were fair?

Nor was it for Mr. O'Sullivan to complain of the practical infallibility of the jury of to-day on the subject of damages.

But defendants and their solicitors who read the pages devoted to "Assessment of damages" may well regret that the Court of Appeal can no longer make the form of order which was condemned by the House of Lords in *Watt v. Watt*, [1905] A.C. 115.

The third edition of Dr. Gatley's work is a justification of the author's choice of its future editor, and a worthy tribute "*Auctoris Amici In Memoriam*."

T. MATHEW.

THE LAW RELATING TO ROAD USERS' RIGHTS, LIABILITIES AND INSURANCE. By HECTOR HUGHES, K.C. pp. liv + 575. London: Sweet & Maxwell Ltd. 30s. net.

Of recent years there have been published several excellent books on the law relating to road traffic, and any newcomer to the field must be of good quality if it is to make its way. The present volume has certain qualities which should insure its success. In the first place as his interesting introduction shows Mr. Hector Hughes has a lively idea of the sociological basis of the legal rules which he expounds. This gives his work a coherence which is sometimes lacking in this type of book. Secondly he has a readable style. Thirdly although the relevant authorities are referred to the book avoids excess of detail, and covers the wide area within reasonable compass. Its weakness lies in a certain wooliness in generalisation, an example of which might be taken for the definition of tort at p. 17.

In a volume of this character which impinges on so many branches of the law the question of selection is always a difficult problem. How far, for example, are the general principles of insurance law to be discussed? Our own inclination would be to omit such matters especially in a book intended for practitioners. Mr. Hughes works on the principle of inclusion. Accepting this it may be said that his incursions into the underlying fields of law are on the whole judicious.

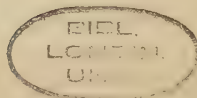
Mr. Hughes first of all discusses the general liability of road users at common law and under statute, dealing at some length with damages and vicarious liability: here the section on contributory negligence is rather slight though lucidly expounded. He has three chapters on the special obligations of road users, devoting particular attention to motor vehicles, and on the effect of death upon causes of action, where he gives an adequate exposition of the *Rose v. Ford* line of cases. There follow a series of chapters upon insurance against claims arising out of road accidents—and these form the main substance of the volume which is essentially concerned with road traffic insurance. These provide a comprehensive and useful treatment of the subject and have the great advantage over older works on insurance of having been written in the light of the recent decisions, particularly of those relating to insurance under the Road Traffic Acts. Mr. Hughes is of opinion that these statutes are functioning well and that the 1934 Act has adequately cured the weaknesses in the original statute.

There are a set of valuable appendices containing the relevant statutes, the report of the recent committee on compulsory insurance, various relevant orders and regulations, and precedents of proposal forms and policies.

R. S. T. CHORLEY.

THE EVIDENCE ACT, 1938, By BURROWS & CAHN, Sweet & Maxwell, (1938), pp. 55. 3s. 6d.

Cf. above p. 304.



THE MODERN LAW REVIEW

CONTENTS

	Page
THE FOUNDATIONS OF TORTIOUS LIABILITY (By A. L. Goodhart)	1
LAW REVISION (By John Foster)	14
A PLEA FOR UTILITARIANISM (By Ivor Jennings)	22
THIRD PARTY INSURANCE (By R. S. T. Chorley and A. M. Finlay)	36
COMMON EMPLOYMENT (By J. Unger)	43
STATUTES The Population (Statistics) Act, 1938 The Hire Purchase Bill	49
REPORTS OF COMMITTEES Report of the Committee on Insurance of Ships Report of the Departmental Committee on Corporal Punishment	54
NOTES OF CASES The Cristina—Morgan v. Scoulding—Feay v. Barnwell—Collins v. J. Adamson & Co.—Groom v. Crocker—Merchant and Manufacturers Co. Ltd. v. Davies—Kingman v. Seager—Evans v. Cross—Croston v. Vaughan—Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.—Lewis v. Cattle.	57
REVIEWS Industrial Insurance (Wilson and Levy)—Crime and the Community (Page)—Oppenheim's International Law (Lauterpacht)—Salmond's Jurisprudence (Parker)—Les Grands Problèmes du Droit (Le Fur)—Lawlessness, Law and Sanction (Rooney)—The Standardization of Commercial Contracts (Prausnitz)—Textbook on the Law of Tort (Winfield)—Clerk & Lindsell on the Law of Torts (Potter)—Underhill's Law of Torts (Sutton)—Private International Law of Succession in England, America and Germany (Breslau)—An Introduction to Equity (Keeton)—Principles of Common Law (Wilshire)—Yearly Supreme Court Practice, 1938 (Simner, Meyer, Hinton and Alloway)—Hints for Young Solicitors and Articled Clerks (Gregory and Tweedie).	76

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